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No. 83-610

OCTOBER TERM, 1983

IN THE SUPREME COURT OF THE UNITED STATES

BABBITT FORD, INC., an Arizona corporation,
Petitioner,

vs.

THE NAVAJO INDIAN TRIBE, through its Chairman, PETERSON ZAH; THE NAVAJO TRIBAL COURTS, through its Chief Justice, NELSON J. McCABE; THE NAVAJO TRIBAL POLICE, through its Superintendent, WILBUR KELLOGG; TOM SELLERS and LORRAINE SELLERS, husband and wife; BARNEY JOE and ALICE JOE, husband and wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED*

Has the Navajo Indian Tribe been divested implicitly under general principles of federal law or expressly through treaties with the United States of the power to compel a non-Indian to submit to tribal court jurisdiction and tribal law as a condition precedent, or to impose monetary liability for failure to comply with such a condition precedent for the peaceful repossession of chattel on the Navajo reservation caused by an individual tribal Indian's default on a secured sales contract executed and performed outside of the Navajo reservation's boundaries whose terms and conditions together with the incorporated provisions of State law authorize self-help repossessions of the chattel sold upon the Indian purchaser's default and breach of the contract?

*All parties to the instant case are listed in the caption of this Petition. Pursuant to Supreme Court Rule 21.1(b) we list here all parties to the proceedings below in the other case with which the instant matter was consolidated.

In *Gurley Motors, Inc. v. MacDonald*, No. 81-6052 in the Court below, the Plaintiff/Appellant was Gurley Motors Inc., a New Mexico corporation. The Defendants/Appellant were Peter MacDonald, Leroy S. Bedonie, Wilbur E. Kellogg, Jr., Homer Bluehouse, Harry D. Brown, Robert D. Walters, and Nelson McCabe, all officials of the Navajo Indian Tribe whom Gurley Motors sued in both their official and individual capacities. Gurley Motors does not join in this Petition.

Pursuant to Supreme Court Rule 28.1 we avow to the Court that Petitioner Babbitt Ford, Inc. neither possesses or is a part of any other parent company, subsidiary, or affiliated corporation or other entity. We further note that upon his election as Navajo Tribal Chairman, Peterson Zah was substituted as a party to this case by operation of law to replace former Navajo Tribal Chairman, Peter MacDonald.

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, and OTHER AUTHORITIES

Cases — Page

PUBLISHED CONGRESSIONAL and EXECUTIVE DOCUMENTS

UNPUBLISHED CONGRESSIONAL and EXECUTIVE DOCUMENTS

OTHER AUTHORITIES

Petitioner, Babbitt Ford, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered on July 15, 1983.

OPINIONS IN THE COURTS BELOW

The opinion of the Ninth Circuit Court of Appeals (Appendix "A", pp. 1-24) is reported at 710 F.2d 587-600 (9th Cir., 1983). The opinion of the United States District Court for the District of Arizona (Appendix "B," pp. 25-56) is reported at 519 F.Supp. 418-434 (D.Ariz., 1983).

JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals (Appendix "D," pp. 57-58) was entered on July 15, 1983. No Petition for Rehearing or Suggestion for Rehearing *En Banc* was filed, and a certified copy of the Judgment in lieu of Mandate (Appendix "E," pp. 59-60) was issued and entered on August 9, 1983.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS INVOLVED

1. Articles I and IV of the Treaty between the United States and the Navajo Indian Tribe, June 1, 1868, 15 Stat. 667, provide:

Article I. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be

proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor. (15 Stat. 667)

Article IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty. (15 Stat. 668)

2. Articles II, III, V, VI, and VII of the Treaty between the United States of America and the Navajo Indian Tribe, September 24, 1850, 9 Stat. 974-976, provides:

Article II. That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons

or powers in amity with the said States, shall be referred to the Government of said States for adjustment and settlement. (9 Stat. 974)

Article III. The Government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the Government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the Government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico. (9 Stat. 974)

Article V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes. (9 Stat. 974-975)

Article VI. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States. (9 Stat. 975)

Article VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States (9 Stat. 975)

3. Arizona Revised Statutes, Section 44-3149 [Uniform Commercial Code Section 9-503] provides:

§ 44-3149. Secured party's right to take possession after default

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under § 44-3150.

4. Navajo Tribal Code, Title 7, Section 607 provides:

§ 607. Repossession of personal property

The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict

compliance with the following: (1) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand. (2) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe, the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding. (Navajo Tribal Council Resolution CF-26-68, February 7, 1968)

5. Navajo Tribal Code, Title 7, Section 608 provides:

§ 608. Violations–Penalty

(a) Any nonmember of the Navajo Tribe, except persons authorized by Federal law to be present on Tribal land, found to be in wilfull violation of 7 N.T.C. § 607 may be excluded from land subject to the jurisdiction of the Navajo Tribe in accordance with procedure set forth in 17 N.T.C. §§ 1903-1906.

(b) Any business whose employees are found to be in wilfull violation of 7 N.T.C. § 607 may be denied the privilege of doing business on land subject to the jurisdiction of the Navajo Tribe.

(c) Any Indian who violates any provision of 7 N.T.C. § 607 shall be guilty of a crime, and upon conviction shall be punished by a fine of not more than $100. (Navajo Tribal Council Resolution CF-26-68, February 7, 1968)

6. Navajo Tribal Code, Title 7, Section 609 provides:

§ 609. Civil liability

Any person who violates 7 N.T.C. § 607 and any business whose employee violates such section is deemed to have breached the peace of the lands under the jurisdiction

of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with 7 N.T.C. § § 607-609.

If the personal property repossessed is consumer goods (to wit: goods used or bought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

Purchaser means the person who owes payment or other performance of an obligation secured by personal property, whether or not the purchaser owns or has rights in the personal property. (Navajo Tribal Council Resolution CJN-53-69, June 4, 1969)

STATEMENT OF THE CASE AND THE MATERIAL FACTS

Petitioner Babbitt Ford, Inc. is engaged in the business of selling new and used motor vehicles in northern Arizona. It has offices only in Flagstaff and Page, Arizona, both of which are outside the boundaries of the Navajo Indian Reservation. Babbitt Ford sells approximately 70 vehicles per month to persons whom it believes are residents of the Navajo Indian Reservation, and approximately 50 percent (50%) of its sales are made to people who reside upon the Navajo Indian Reservation. (Appendix, pp. 3, 26; 519 F.Supp. at 421; 710 F.2d. at 590 [Record, Items No. 1, pp. 2-3 and No. 20, p. 5].)

Babbitt Ford does not negotiate or execute any contracts on the Navajo Indian Reservation and does not conduct any business there. All auto sales contracts with Indians are negotiated and executed at Babbitt's dealerships in Flagstaff and Page, Arizona, and the execution of any and all loan and security agreements together with the delivery of the motor vehicle occur off of the Navajo Indian Reservation at Babbitt's dealerships. (Appendix, pp. 3-4; 710 F.2d. at 590 [Record, Items No. 1, pp. 2-3 and 20, p. 5].)

Lending institutions make loans to the majority of these Indian reservation customers only if Babbitt Ford guarantees payment of the purchase money loan made to the buyer by the lender. As a result of this guarantor position, Babbitt Ford regularly is required to pay to the lender the purchase money loans which have been breached by the reservation buyer. Babbitt Ford then pursues recoupment of its loss through repossession of the subject vehicle. Babbitt Ford peacefully repossesses approximately ten (10) vehicles per month within the boundaries of the Navajo Indian Reservation from persons whom it believes to be enrolled members of the Navajo Indian Tribe. (Appendix, pp. 3, 26; 519 F.Supp. at 421, note 2 [Record, Items No. 1, p. 3 and No. 20, pp. 6-7].)

Babbitt Ford's acts of repossessing vehicles are lawful under Arizona law pursuant to A.R.S. § 44-3149. This statute permits a secured party to take possession of the collateral upon default by the purchaser without judicial process if this can be done without breach of the peace. The District Court found that in the exercise of this right Babbitt Ford has "peacefully repossessed their vehicles" at all times material to this proceeding. (Appendix, pp. 3, 26; 519 F.Supp. at 421 [Record, Item No. 1, p. 3].)

However, repossession of the personal property of a defaulting, Navajo Indian purchaser within the boundaries of the Navajo Reservation is prohibited by the Navajo Tribal Code, 7 N.T.C. § 607, unless one of two conditions precedent are met: The repossessor must either obtain the written consent of the defaulting purchaser of the vehicle or, if the defaulting owner refuses to give such consent, the repossessor must obtain an order from the Navajo Tribal Courts to effect repossession. (Appendix, pp. 3-4, 26-27; 519 F.Supp. at 421, 710 F.2d. at 590, note 1 [Record Item No. 1, p. 3].)

According to the Navajo Tribal Code, if the procedure specified in 7 N.T.C. § 607 is not followed, the repossessor is liable to the defaulting purchaser of the vehicle pursuant to 7 N.T.C. § 609 which subjects the repossessor to liability in "an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price" which sums are payable to the defaulting, Indian purchaser. (Appendix, pp. 3-4, 26-27; 519 F.Supp. at 421; 710 F.2d. at 590.)

In November, 1978 Babbitt Ford repossessed within the boundaries of the Navajo Indian Reservation a vehicle purchased by Respondents Tom and Lorraine Sellers following the Sellers' failure to make the monthly payments required by their purchase loan on the vehicle. The loan, which Babbitt Ford had guaranteed, specified that it was to be governed by the laws of the State of Arizona and had in fact been negotiated

and executed in Flagstaff, Arizona, outside of the boundaries of the Navajo Reservation. In repossessing this vehicle, Babbitt Ford did not obtain the written consent of the Sellers nor did it obtain a Navajo Tribal Court order authorizing repossession. (Appendix, pp. 4, 49; 710 F.2d. at 591 [Record, Item No. 1, p. 3].)

Tom and Lorraine Sellers thereafter filed suit against Babbitt Ford in the Navajo Tribal Court pursuant to 7 N.T.C. §§ 607 and 609 and served Babbitt Ford with process outside of the territorial boundaries of the Navajo Indian Reservation. On November 29, 1979, the Sellers obtained a judgment against Babbitt Ford from the Navajo Tribal Court in the amount of $476.65. (Appendix, pp. 4, 49; 710 F.2d. at 591.)

On May 14, 1979, Babbitt Ford peacefully repossessed within the territorial boundaries of the Navajo Indian Reservation a vehicle purchased by Respondents Barney and Alice Joe following the Joes' failure to make the monthly payments required by their purchase agreement with Babbitt Ford. Babbitt Ford had guaranteed the Joes' loan which had been negotiated and executed in Flagstaff, Arizona, outside of the territorial boundaries of the Navajo Indian Reservation and which specified that it was to be governed by the laws of the State of Arizona. However, Babbitt Ford did not obtain the written consent of the Joes prior to reposessing this vehicle nor did it obtain a Navajo Tribal Court Order authorizing the repossession. (Appendix, pp. 4, 49; 710 F.2d. at 591 [Record, Item No. 1, p. 4].)

Thereafter, Alice and Barney Joe filed suit against Babbitt Ford in the Navajo tribal court under 7 N.T.C. § 607 and § 609 and served Babbitt with process in Flagstaff, Arizona outside of the territorial boundaries of the Navajo Indian Reservation. On March 24, 1980, the Joes obtained a judgment against Babbitt Ford pursuant to 7 N.T.C. § 609 from the Navajo Tribal Court in the amount of $4,466.75. This judgment also purported to exclude Babbitt Ford from entering upon the

Navajo Reservation for such purposes as repossessing automobiles, collecting debts, or soliciting prospective customers. (Appendix, pp. 4, 49; 519 F.Supp. at 432, note 9; 710 F.2d. at 591 [Record, Item No. 1, p. 4 and No. 15, Exhibit "C"].)

After unsuccessfully exhausting its Navajo tribal appeals through special appearances contesting the jurisdiction of the tribal courts, Babbitt Ford filed its Complaint on August 27, 1980 in the United States District Court for the District of Arizona against Respondents seeking a declaratory judgment as well as preliminary and permanent injunctive relief. Babbitt Ford's Complaint predicated subject matter jurisdiction in the District Court upon 28 U.S.C. § 1331 and alleged that, by subjecting Babbitt Ford to civil liability, suit, judgment, and execution in the Navajo tribal courts, Respondents had acted without lawful authority or jurisdiction inasmuch as the assertion of tribal law and tribal court jurisdiction over non-Indians like Babbitt Ford violated and was void against the Constitution, laws and treaties of the United States, especially the federal common law rule of implicit divestiture of tribal power over nonmembers and the 1850 and 1868 treaties between the Navajo Indian Tribe and the United States, 9 Stat. 974 and 15 Stat. 667, respectively. (Appendix, pp. 1-4, 26-28; 519 F.Supp. at 421-433; 710 F.2d. at 591-601 [Record, Items No. 1, 2, 3].)

After hearing and the submission of the case on the merits, the District Court, Carl A. Muecke, Chief Judge, issued its Memorandum Opinion and Order on July 14, 1981. The District Court held that it had subject matter jurisdiction under 28 U.S.C. § 1331 and the federal common law to adjudicate the merits of the Complaint but dismissed for failure to state a claim Babbitt Ford's allegations based upon the 1850 and 1868 Treaties. However, finding that Babbitts "have exercised their rights under state law and have peacefully repossessed their vehicles," 519 F.Supp. at 421, but nevertheless had been "dragged unwillingly into a foreign forum which may or may not accord [them] the rights to which [they] would be entitled

in a court of the United States," 519 F.Supp. at 429, the District Court ruled that the enforcement of the statutory civil damage provision of the Navajo Tribal Code against non-Indians with respect to repossessions "which are substantially justified by the parties' contract and applicable law thereto" was beyond the limits of tribal sovereign power and was inconsistent with the overriding interest of the federal government since it amounted to an award of damages in excess of those actually suffered, if any, by the individual Indians, thus "punish[ing] non-Indians." The District Court accordingly enjoined the award and enforcement of the statutory damage penalty under 7 N.T.C. § 607 and § 609 but "removed" Babbitt Ford's case against Respondents Sellers and Joe to the Navajo tribal courts for retrial under a standard of liability and damages fashioned by the District Court itself; namely, an award of damages, if any, against non-Indians which "reasonably compensated" an individual Indian "for his losses, if any, but only as to repossessions that were not justified by the parties' contract or the law applicable thereto." The District Court further enjoined the Respondent Tribe from retaining any property belonging to Babbitt Ford, specifically, a tow truck seized on July 25, 1980 by the Navajo tribal police under tribal court execution in the Sellers' case. Final judgment embodying these findings and conclusions was entered on November 20, 1981. (Appendix, pp. 26-52; 519 F.Supp. at 426-432 [Record, Item No. 58, pp. 1-].)

On appeal and cross-appeal perfected by Petitioner and Respondents Sellers and Joe (the Navajo Tribe did not appeal from the District Court's judgment) the United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment in part and reversed it in part. The Court of Appeals affirmed the District Court's judgment determining that subject matter jurisdiction existed under 28 U.S.C. § 1331 because the case raised a substantial question arising under the federal common law. (Appendix, p. 5; 710 F.2d. at 591.) The Court of

Appeals also upheld the District Court's judgment dismissing Babbitt Ford's claims asserted under the 1850 and 1868 Treaties because, while these Treaties divested the Navajo Tribe of criminal jurisdiction over non-members, they permitted the construction given to them by the District Court "favoring concurrent civil jurisdiction on the part of the Tribe and the federal government" over non-Indians. (Appendix, pp. 12-17; 710 F.2d. at 596-597.)

However, the Court of Appeals reversed the District Court's judgment which determined that 7 N.T.C. § 607 and § 609 could not be applied as written to Babbitt Ford's repossession activities on the reservation. The Court of Appeals held that "the Tribe's exercise of civil jurisdiction over non-Indians conducting repossessions on reservation land is not within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status" because "[t]he Navajo reservation covers a vast expansion of land" and the repossession of an automobile from a defaulting Indian purchaser "has the potential to leave a tribal member stranded miles from his or her nearest neighbor" and since "without the consent of the tribal member also may escalate into violence, particularly if others join in the affray." (Appendix, p. 9; 710 F.2d. at 593.) Finally, the Court of Appeals reversed the District Court's judgment determining that 7 N.T.C. § 609 was penal in nature since, in the Ninth Circuit view the District Court's "reliance on contract law is misplaced." (Appendix, pp. 21-24; 710 F.2d. at 593.)

REASONS AND ARGUMENT FOR GRANTING THE PETITION

In this case the Ninth Circuit Court of Appeals holds that a vendor's peaceful repossession of secured chattel validly effected under the terms of the contract and the law of the State in which the purchase contract was negotiated, executed and performed and in which the goods were delivered, from an individual Indian who has defaulted on his contractual obliga-

tions, becomes unlawful and constitutes sufficient grounds on which to subject the non-Indian seller to monetary liability prescribed by Indian tribal law in an Indian tribal court proceeding because the purchase is a reservation Indian and the repossession occurred on an Indian reservation. In its substantive principles, the Ninth Circuit's decision conflicts with decisions on the same subject matter rendered by the highest courts of several States and extends in an unwarranted way this Court's decisions articulating a standard by which lower courts may determine when and under what circumstances an Indian tribe may assert civil jurisdiction over non-Indians. In its practical implications, the Ninth Circuit's decision pose issues of substantial, national importance, particularly as to States in the West and Mid-West which are checkerboarded with Indian reservations, because if that decision stands, it will have a chilling effect upon millions of dollars of present and future secured, financial transactions consummated off of the reservations by individual Indians, will inhibit the ability of individual Indians to obtain credit and secured loans while arguably eroding the cultivation of individual, Indian responsibility, and will jeopardize existing uniformity within and among the several states with respect to the enforcement of commercial and contractual rights and obligations by effectively transforming a nation of fifty states into one of over a hundred tribal states all of which possess the inherent sovereign power to modify unilaterally off-reservation contracts authorizing on-reservation enforcement upon breach according to their own self-defined tribal customs and practices.

A. The Ninth Circuit's Decision Conflicts with the Decisions of the Supreme Courts of Several States on a Federal Question of Substantial, National Significance.

In *Brown v. Babbitt Ford, Inc., 117* Ariz. 192, 571 P.2d. 689 (App., 1977) the Arizona Court of Appeals held that

Arizona law, not Navajo tribal law as defined in 7 N.T.C. § 607 and § 609, governed a non-Indian's rights as to repossessions effected on the Navajo Indian Reservation because "by granting to the seller all rights granted by the Arizona Uniform Commercial Code, including the right to self-help in repossessions upon default" under A.R.S.§ 44-3149 and "by specifically stating that the contract would be interpreted and enforced under Arizona law," Babbitt Ford and the defaulting Indian purchaser "have by contract excluded the possibility that this contract would be effected by the provisions of the Navajo Tribal Code," thus making it "clear that Babbitt had the right under Arizona law to do exactly what it did in repossessing the pickup without liability." 117 Ariz. at 199, 571 P.2d. at 696. The Arizona Supreme Court expressly declined to alter this holding.

In *Little Horn State Bank v. Stops*, 555 P.2d. 211 (Mont., 1976), *cert. denied*, 431 U.S. 924 (1977), an enrolled member of an Indian tribe residing on an Indian reservation obtained a loan from a bank located off the reservation. The Indian failed to repay the loan, and the bank obtained a judgment in state court against him. Thereafter, a writ of execution was issued to enforce the judgment and was levied in the form of a wage garnishment by the local sheriff within the boundaries of the Indian reservation where the Indian worked. The Montana Supreme Court held that jurisdiction of the dispute between the Indian and the bank as well as enforcement of the judgment against the Indian was controlled by State law, not tribal law or tribal court jurisdiction. Distinguishing this Court's precedent, the Montana Supreme Court reasoned that when "tribal members elect to leave the reservation and conduct their affairs within the jurisdiction of the state courts," they "are submitting themselves to the laws of this state" for all purposes respecting the transaction in question and "cannot violate those laws and then retreat to the sanctuary of the reservation for protection." 555 P.2d. at 213-214. Ruling that

a tribal Indian "cannot interpose his special status as an Indian as a shield to protect him from obligations that have been entered into off the reservation," the Montana Supreme Court concluded that the reservation Indian "elected to be governed by the laws of this state when they left the boundaries of the reservation to obtain the loan from" the bank. 555 P.2d. at 214.

Similarly, in *Deluth Lumber and Plywood Company v. Delta Development, Inc.*, 281 N.W.2d. 377 (Minn., 1979) the Minnesota Supreme Court followed *Little Horn* to reach a similar conclusion. In *Deluth Lumber* a non-Indian materialman furnished material to a general contractor and an Indian tribal housing authority to be used in the construction of a housing project on an Indian reservation. The Indian tribal housing authority breached its duty to make certain that no final payments on the project would be made to the general contractor until all materialmen had been paid. As a result, the lumber company was not paid and accordingly brought suit in the Minnesota State Courts against the Indian tribal housing authority which defended on the grounds that the dispute could only be governed by Indian tribal law in a tribal court. The Minnesota Supreme Court rejected this claim and upheld the judgment against the tribal housing authority. Emphasizing that "[t]his case can be distinguished" from *Williams v. Lee*, 358 U.S. 217 (1959) "because the transaction occurred entirely on the reservation" in *Williams* while in this case "the transaction is not confined to the reservation," the Court ruled that "subject matter jurisdiction lies with the state court, not the tribal court." 281 N.W.2d. at 382. The Minnesota Supreme Court concluded that by entering into an agreement with the non-Indian lumber company, "the Housing Authority is deemed to have submitted itself to the jurisdiction of non-Indian institutions for the purpose of construing and enforcing the agreement" and that "[c]onstruction and application of the agreement are at stake, not the governmental functions, laws, and

customs of the tribe." 281 N.W.2d. at 383. *See also, State, etc. v. Red Lake DFL Committee*, 303 N.W.2d. 54, 56 (Minn., 1981)[tribal election committee subject to state law because of some off-reservation acts.]

In the companion cases of *UNC Resources, Inc. v. Benally*, 514 F.Supp. 358 (D.N.M., 1981) and 518 F.Supp. 1046 (D. Ariz., 1981) the United States District Court for New Mexico and Arizona held that Navajo tribal courts did not have the power to assume civil jurisdiction over an action by reservation Indians against a non-Indian corporation for personal injuries arising from the failure of the corporation's contaminent structure which permitted radioactive waste to flow through a river onto the Navajo Reservation thereby causing injury and damage on the reservation to tribal Indians. "[E]ven though the injuries occurred on the reservation," the Arizona District Court ruled, "the attempt to provide a tribal forum to redress such injuries cannot be said to be clearly related to tribal self-government or internal relations." Instead, the Arizona District Court held, "the power to assess civil penalties is the power to invade interests of the type the United States has concern in protecting" and "the exercise of civil jurisdiction by the Tribal Court is inconsistent with the overriding interests of the federal government in preventing unwarranted intrusions on protected property interests." Like the District Court in Arizona, the District Court in New Mexico applied this Court's recent decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) to hold that "[i]t does not matter that the Navajo tribe may have an interest in holding tortfeasors responsible for injuries to Indian land" since "[i]f the interest in punishing violations of tribal criminal law by persons on the reservation was insufficient to support tribal jurisdiction in *Oliphant*, the Navajo tribe's lesser interest in applying its civil standards of behavior to conduct off the reservation will not sustain jurisdiction here." 514 F.Supp. at 361-362. *Accord: National Farmers Union Insurance Com-*

pany v. Crow Tribe of Indians, 560 F.Supp. 213 (D.Mont., 1981) [tribal court lacked jurisdiction over tort claim by Indian injured on school premises within reservation.]

And, in *American Indian Agricultural Credit Consortium, Inc. v. Fredericks*, 551 F.Supp. 1020 (D.Colo., 1982) the Court rejected the argument advanced by an Indian in default on a promissory note that, because the note was executed and spent on an Indian reservation, the transaction was an internal reservation matter committed to the jurisdiction of the tribal courts. Where the matter involves "a transaction between an outside corporation and an individual member of a tribe acting solely in his private capacity as signer of a promissory note now in default," the Court ruled that it "cannot detect any interference with reservation self government or internal tribal affairs" sufficient to support tribal jurisdiction. 555 F.Supp. at 1022.

The Ninth Circuit's decision here and others analogous to it conflict with the decisions discussed above and, viewed against these decisions, illustrate the confusion and controversy among state and federal courts at the trial and appellate level with respect to whether or not tribal law can govern the rights, duties and remedies of off-reservation contractual relationships between Indians and non-Indians.[1] This matter involves very substantial rights and liabilities, Babbitt Ford alone having over a million dollars of outstanding reservation loans on its books. We submit that a decade of conflicting state appellate and

[1]Consistent with the Ninth Circuit's decision here are a number of earlier decisions which simply magnify the present conflict and dramatize the needs for its resolution. Thus, a District Court in South Dakota has rejected the *Little Horn* holding, *supra*, and has reached a result opposite to that followed by the Montana Supreme Court. *Annis v. Dewey County Bank*, 335 F.Supp. 133 (D.S.C., 1971). Unlike the Arizona appellate courts, the New Mexico state courts accord full faith and credit to the tribal law at issue here with respect to on-reservation repossessions but not those which occur on off-reservation allotments. *General Motors Acceptance Corporation v. Chischilly*, 628 P.2d. 683 (N.M., 1981); *Jim v. CIT Services Corporation*, 533 P.2d. 751 (N.M., 1975).

federal district court decisions on this issue creates a stalemate in the law which merits clarification from this Court.

The substantial, national importance of this issue is illustrated by a cursory glance at a United States map. Under the Ninth Circuit's decision, the fourteen (14) Indian reservations in Arizona and the more than one hundred such reservations nationwide may now unilaterally alter off-reservation, contractual obligations according to their own self-defined customs and practices and dictate to the non-Indian sellers and lenders the terms and conditions under which they may have recourse against *defaulting*, reservation Indians with respect to off-reservation, commercial dealings notwithstanding this Court's admonition of a decade ago, that "[a]bsent express federal law to the contrary" of which there is none here, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973) [citations omitted].

Indeed, the pernicious effect of the Ninth Circuit's decision here is that it transforms a nation of fifty states possessing generally uniform laws regarding contractual and commercial obligations into a nation of over a hundred tribal states which can control off-reservation, commercial rights, duties and remedies according to their own self-defined customs and practices without regard to the agreement negotiated and executed by the contracting parties. The Ninth Circuit's decision simply fails to perceive that the marrow of American commercial law, evidenced in a compelling way by the adoption in 50 States, the District of Columbia, and the Virgin Islands of the Uniform Commercial Code, is uniformly and certainty of binding, contractual obligations governed by definite and well understood standards rooted in Anglo-American contract law. By empowering Indian tribes to alter unilaterally off-reservation contractual rights, duties and remedies merely because a tribal Indian is one of the contracting parties, the Ninth Circuit's decision

permits the erosion of the uniformity and security which the several states have achieved in commercial affairs in order to facilitate the free flow of commerce both within and without their respective borders.

Furthermore, the Ninth Circuit's decision chills the ability of individual Indians, tribal corporations, or tribes themselves to obtain credit or engage in off-reservation, commercial ventures which require the creation of security interests or the extension of credit. Quite simply, off-reservation lending institutions and vendors of chattel on credit rely on their contractual rights as written under the laws of the State in which the contract is executed and will not loan money or sell goods on credit if they have no certainty of contractual recourse against reservation Indian purchasers in the event of default. Individual Indian credit transactions for automobiles and other such goods and off-reservation, commercial dealings by tribal corporations and Indian tribes will be hampered by the Ninth Circuit's decision because off-reservation credit lenders and vendors will be disinclined to deal in a commercial world governed not by certainty of contractual rights and uniformity of state laws but by the diverse customs of fourteen or a hundred different Indian tribes which, from time to time, may elect to alter unilaterally previously executed, off-reservation contractual rights and remedies in any way they choose, even to the point, as here, of protecting and even rewarding the *defaulting* Indian at the expense of the non-Indian who is guilty of no more than abiding by his off-reservation, contractual rights and remedies.

As such, the Ninth Circuit's decision contains the potential of retarding the cultivation of individual, Indian responsibility by effectively teaching tribal Indians that they can default on their off-reservation, contractual obligations and yet avoid the full measure of these obligations by retreating into a reservation sanctuary in which they may even be monetarily rewarded for their contractual breach if the secured party exercises his contractual rights. In the instant matter, the same contractually authorized and lawful act of peaceful repossession permitted

one *defaulting* Indian purchaser to recover $476.75 and another, $4,455.75. Rewarding Indian irresponsibility, as the Ninth Circuit's decision does, erodes the fostering of Indian responsibility inherent in the present national policy of Indian self-determination by creating a class of super-citizens who, with the blessings of a federal appeals court, may go freely into off-reservation communities to transact commerce yet remain immune from the responsibilities imposed by uniform, nondiscriminatory state laws upon all other citizens of the community. Such ramifications coupled with the conflicting, appellate and trial court decisions on the subject, militate in favor of review and resolution by this Court.

B. The Ninth Circuit's Decision Is At Odds With The Standard Fashioned By The Supreme Court For Determining When And Under What Circumstances An Indian Tribe May Compel Non-Indians To Submit To Tribal Court Proceedings And The Application Of Tribal Law.

The Ninth Circuit holds in the present matter that because "[t]he Navajo reservation covers a vast expansion of land" and "[r]epossession of an automobile has the potential to leave a tribal member stranded miles from his or her nearest neighbor," 7 N.T.C. § 607 and § 609 are "necessary exercise[s] of tribal self-government and territorial management." 710 F.2d. at 593, Appendix "A," p. 9. And, inspite of the District Court's undisputed finding that Babbitt Ford did no more than "exercise their rights under state law and have peacefully repossessed their vehicles," 519 F.Supp. at 421, Appendix "B," p. 9, the Court of Appeals upholds 7 N.T.C. § 607 and § 609 because "[a] repossession without the consent of the tribe member also may escalate into violence, particularly if others join the affray." 710 F.2d. at 593. We submit that this holding deviates so far from the decisions of this Court that the Ninth Circuit has created a new standard at odds with this Court's decisions.

In *Montana v. United States*, 450 U.S. 544 (1981) the Court held that the "exercise of tribal power beyond what is *necessary* to protect tribal self-government or to control internal relations" among tribal members "is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation." 450 U.S. at 464. The analytical standard defined by the Court for cases such as the present matter established implicit divestitute of tribal power over non-Indians as the general rule, with the existence of such power being the exception:

> The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians.*** Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support *the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.* To be sure, Indian tribes retain inherent sovereign power to exercise *some form* of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee land. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. [citations omitted.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe. 450 U.S. at 565-566, emphasis added.

The *Montana* holding's extension of *Oliphant's* general principles of tribal civil jurisdiction is especially significant in terms of the facts of the *Oliphant* case. Notwithstanding a

non-Indian's "assaulting a tribal officer and resisting arrest" and "an alleged high-speed race along the Reservation highways" ending in a collision with a tribal police vehicle, 435 U.S. at 194, the Court held that an Indian tribe could not assert jurisdiction over nor apply tribal law to the two non-Indian petitioners. Because "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberties," the Court ruled that these overriding national interests prevented the extension of tribal laws "over aliens and strangers; over the members of a community separated by race [and] tradition . . . from the authority and power which seeks to impose upon them the restrains of an external and unknown code . . . , which judges them by a standard made by others and not for them" and which "tries them, not by their peers, not by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception." 435 U.S. at 210-211 quoting *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883).

Under *Montana's* first exception to the general rule of implicit divestiture, Babbitt Ford's presence on the reservation is in no way consensual but in fact is the very opposite. Upon contractual default by a reservation Indian, Babbitt is compelled to enter the reservation or simply foresake its security interest in the vehicle as well as the vehicle itself. But for the reservation Indian's default, which Babbitt does not cause and which it would prefer would not happen, Babbitt Ford would never even need or desire to go upon the reservation and would not do so since it conducts no business on the reservation and does not excute or perform any contracts or deliver any goods there. Being faced with the Hobbsian choice of either giving up its security and the vehicle itself or entering the reservation to protect and retrieve the same, Babbitt Ford is coercively compelled through the individual Indian's default to submit to tribal

law and the tribal courts since the only way to avoid these would be to foresake both the vehicle and the security interest in it. Thus, any application of tribal law in the tribal courts to Babbitt Ford results, not from any consensual relationship or acts, but from the involuntary coercion caused by the reservation Indian's default on the off-reservation, contractual obligations.

Indeed, the only consensual aspects of the relationship have absolutely nothing to do with the Navajo reservation or Navajo tribal law. The individual, tribal Indian alone voluntarily leaves the reservation to buy a motor vehicle from Babbitt Ford and enters into a purchase contract and loan transaction executed and performed in the State of Arizona where the goods are delivered. The individual, tribal Indian and Babbitt Ford specifically agree that the contract will be governed only by Arizona's Uniform Commercial Code. The authorities cited in *Montana*, 450 U.S. at 555-556, to illustrate the scope of this first exception to the general rule of implicit divestiture indicate that contractual and commercial transactions between tribal members and non-members may be subject to "some" but not all forms of tribal regulation only if the non-member freely chooses to enter the reservation and transact business there and only if the execution and performance of the contract occurs entirely on and is confined to the Indian reservation. These conditions precedent simply do not exist in this case.

Nor under Montana's second exception to the general rule of implicit divestiture does the mere convenience of individual, *DEFAULTING*, reservation Indians to travel to a far away neighbor's hogan in a vehicle for which they have not paid constitute an interest which is "necessary" to or has a "direct effect" upon "the political integrity, economic security or health and welfare of the tribe" as a governmental unit inspite of the Ninth Circuit's belief to the contrary. 710 F.2d. at 593. The regulation of off-reservation, commercial transactions between individual Navajos and non-members of the tribe

simply are not essential or "necessary to protect tribal self-government," especially since the tribe is not even a party to the agreement. The private commercial dealings of individual Navajo Indians off of the reservation have nothing to do with the exercise of tribal, governmental powers. Absolutely no legitimate governmental interest of any kind is furthered by unilaterally altering purely private contracts in which the tribe is not involved or by permitting an individual Indian to retreat into a reservation sanctuary, breach his contractual obligations previously consummated outside of the reservation, and be allowed to superimpose his so-called special status as a tribal Indian to avoid bearing the full burdens and consequences of his contractual breach. Correlatively, no legitimate governmental purpose of any kind is served by burdening and penalizing a non-Indian for exercising in a peaceful and lawful way the full measure of his contractual rights voluntarily granted through an off-reservation transaction with a tribal Indian while, at the same time, rewarding the Indian for breaching his contract after having sought refuge within the reservation. *Cf. Thomas v. Gay*, 169 U.S. 265, 275 (1898); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129 (1906).

Quite simply, Navajo tribal sovereignty is not infringed by requiring Navajos who voluntarily choose to leave the reservation to trade with non-Indians to abide by the full measure of their off-reservation contractual rights, duties, and remedies any more than such sovereignty is infringed by permitting the non-Indian contracting party to do the same. We submit that it is the quintessence of caprice for the Ninth Circuit to hold otherwise in the name of the mere convenience of defaulting, Indian purchasers.

Moreover, the undisputed facts, found by the District Court and not questioned by the Court of Appeals, that Babbitts "have exercised their rights under state law and *have peacefully repossessed their vehicles,*" vitiates the Ninth Circuit's attempt to justify the application of these tribal laws on the ground that they are necessary to prevent violence on

the reservation. Both the terms of the off-reservation contract and the laws of the State of Arizona incorporated in it adequately protect individual Indians from violence and deter Babbitt Ford from engaging in it when repossessing a vehicle. Under both the sales contract and state law, A.R.S. § 44-3149, Babbitt must act peacefully in order to effect a valid and lawful repossession since, if it does not, it breaches both the contract and violates state law and would not only render the repossession invalid but would also be liable to the Indian for the full measure of damages and other restitution provided by Arizona's Uniform Commercial Code.[2] Inasmuch as 7 N.T.C. § 607 and § 609 apply without reference to any threat or potential for violence in automobile repossessions, these tribal laws add nothing to the contractually mandated deterrences against violence and, by merely imposing unilateral burdens and modifications on the lawful exercise of off-reservation, contractual rights, these tribal enactments are in no way "necessary" or "essential" to protect tribal government.

[2]The Court's recent decision in *Rice v. Rehner*, U.S. , 103 S.Ct. 3291 (1983) makes it clear that state law should apply here. Reversing an *en banc* panel of the Ninth Circuit Court of Appeals, this Court held that a state could require a federally licensed Indian trader who was a member of the governing Indian tribe to obtain a state liquor license for on-reservation sales. Emphasizing that "any applicable regulatory interest of the state must be given weight and automatic exemptions as a matter of constitutional law are unusual," 103 S.Ct. at 3298, the Court held that state law was not pre-empted because the activity at issue "potentially has a substantial impact beyond the reservation," no historical tradition of tribal regulations of the activity at issue existed, and since "Congress did not intend to make tribal members 'super citizens' who could" engage in the activity "free from all but self-imposed regulations." 103 S.Ct. at 3303. All of these factors exist here. As noted earlier, the effect on off-reservation commercial sales, secured transactions and loan activities is here substantial. The fact that 7 N.T.C. § 607 and § 608 were only enacted in 1959, with 7 N.T.C. § 609 following in 1969, vitiates any historical or traditional tribal claims to regulate the activity. And here, as in *Rice*, the Indians are not super citizens immune from all but self-imposed laws.

Furthermore, we have some difficulty perceiving why the tribe's lesser interest in inhibiting the abstract potential for violence attending civil, contractual remedies permits it to impose its laws and the jurisdiction of its tribal courts here when in *Oliphant* the actual presence of serious violence–an assault on a tribal police officer and a high speed chase on reservation lands endangering Indian life and limb–which posed a serious, present threat to the tribe's greater interest in public peace and reservation order did not permit the exercise of tribal jurisdiction over non-Indian wrongdoers. This is especially significant because the same intrusions upon personal liberties and property rights flowing from the application of tribal law and tribal court jurisdiction which existed in *Oliphant* are present here.

The consent provisions of 7 N.T.C. § 607 compel a non-Indian who is peacefully and lawfully exercising his rights and remedies under an off-reservation contract incorporating valid, self-help remedies authorized by state law, to modify his vested, contractual rights and liberties at the unilateral insistence of the party already in breach or default under that contract. This sort of intrusion upon Babbitt Ford's vested, contractual rights and liberties is evident from the Court's precedent. Recognizing that under the Contract Clause the *"[i]mpairment of an obligation means refusal to pay an honest debt" as well as "a change of the express stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements,"* the Court has recognized that "[t]he inviolability of contracts, and the duty of performing them, as made, are foundations of a well ordered society and to preserve the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed." *Murray v. City Council of Charleston,* 96 U.S. (6 Otto.) 432, 444 (1877); *Faitoute Iron & Steel Company v. City of Asbury Park,* 316 U.S. 502, 511 (1942); *Ogden v. Sanders,* 25 U.S. (12 Wheat.) 213, 217-218 (1827).

If the defaulting Indian purchaser refuses to consent to a lawful and peaceful repossession, Babbitt Ford is compelled to go into a tribal court for a repossession order or to abandon the vehicle and its security in it. However, under 7 N.T.C. § 607 *absolutely no standards* whatever are set forth to guide, limit or define the tribal court's judgment in granting or denying a repossession order. The inherent problems of vagueness here and the potential for arbitrary and capricious abuse of authority are not remedied by 7 N.T.C. § 204 because under this enactment, absent a controlling federal statute or regulation, the tribal court must apply as the law of the Navajo Tribe "any ordinance or custom of the tribe not prohibited by federal law" and to seek out "the advice of counsellors familiar with these customs and usages." (Appendix "J", p. 103.) Since the "customs and usages" of the Navajo tribe supersede state law under the mandate of 7 N.T.C. § 204(c) and thus constitute the primary standard upon which the grant or denial of a repossession order would be based the spectre of *Oliphant* is directly present here. Babbitt Ford has no knowledge of what the customs and practices of the Navajo Tribe demand and the off-reservation contracts are not made with reference to these unknown standards. Thus, in being compelled to enter a tribal court to exercise peacefully its lawful, vested, contractual right, Babbitt Ford is forced against its will to submit to a tribunal "which judges them by a standard made by others and not for them" and which "tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception." *Oliphant v. Suquamish Indian Tribe, supra,* 435 U.S. at 210-211.

These problems are only the tip of the extraconstitutional iceberg which Babbitt Ford's compulsory submission to tribal court jurisdiction involves. 7 N.T.C. § 251 permits "any member of the Navajo Tribe of Indians" to serve as a tribal court judge without any formal legal training even as these tribal

court judges are permitted under 7 N.T.C. § 204 to interpret federal and state law. (Appendix "J," p. 104.) Under 7 N.T.C. § 654 only members of the Navajo Tribe may serve as tribal court jurors. 2 N.T.C. § 572(a) makes it a condition precedent to hold office of tribal court judge that the Navajo Indian must "serve the best interests of the Navajo tribe," a requirement which is the very opposite of and anathema to the oath taken by all federal and state court judges to dispense justice impartially in complete obedience to the Constitution and laws of the United States. (Appendix "J," p. 105.) This fact coupled with the systematic exclusion of an identifiable and distinct group–non-Indians–from tribal court jury lists again invoke the Court's words in *Oliphant* that in order to exercise peacefully its lawful, contractual rights and remedies, Babbitt Ford is compelled to submit to a tribunal of "aliens and strangers . . . which judges them by a standard made by others and not for them" by an "authority and power which seeks to impose upon them the restraints of an external and unknown code." *Oliphant v. Suquamish Indian Tribe, supra,* 435 U.S. at 210-211.

Moreover, the Navajo Tribal Council's Resolution CO-63-67 (1967) (Appendix "J," pp. 106-108), codified as Title 1, Chapter 1 of the Navajo Tribal Code, while styled as a Bill of Rights, does not embody all of the provisions of the Constitution's Bill of Rights and, through its Preamble's declaration which speaks only of the "Navajo people," appears to apply only to tribal members.[3] No provisions are made in the Navajo Bill of Rights to secure basic Fifth and Fourteenth Amendment rights to due process in matters of property or liberty interests and equal

[3]In connection with the Navajo Bill of Rights, it should be noted the Navajo Tribe has never organized itself under the Indian Reorganization Act of 1935, 25 U.S.C. § 476 nor has it adopted a constitution pursuant to that enactment, inspite of the specific invitation extended by Congress to do so under the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 636. Neither Chapter 1, Title 1 of the Navajo Code nor any other provisions thereof flows from a congressionally authorized or recognized power.

protection, and in view of the fact that appeals are purely discretionary under 7 N.T.C. § 801 and governed by tribal custom and practices under 7 N.T.C. § 204, the complete absence from the Navajo Bill of Rights of the Seventh Amendment guarantee that no fact tried by a jury shall be re-examined otherwise than according to the rules of the common law is both striking and serious. (Appendix "J," pp. 105-107) No other federal or state law supplies these extraconstitutional omissions.[4]

Plainly, these extraconstitutional and unwarranted intrusions upon Babbitt Ford's personal liberties and property interests wrought by compulsory submission to the Navajo tribal courts by virtue of the exercise of an otherwise peaceful and lawful act are as great, if not greater, here than those involved in *Oliphant, supra.* Yet, "the Court has found such a[n] [implicit] divestiture [of tribal power over non-Indians] in cases where the exercise of tribal sovereignty would be inconsistent with overriding interests of the National Government, as when the tribe seeks to . . . prosecute non-Indians in tribal

[4]The Ninth Circuit's belief that the Indian Civil Rights Act, 25 U.S.C. § 1305, *et seq.* provides Babbitt Ford with a remedy is erroneous. The ICRA does not itself impose the full measure of the Bill of Rights and permits only habeas corpus relief which "may not be used as a means . . . to determine property rights" or contractual matters. 39 *C.J.S.* "Habeas Corpus," § 7 pp. 472, 476, note 47; *Griswold v. Gomes,* 111 Ariz. 59, 62, 523 P.2d. 490 (1974). Equally erroneous is the Ninth Circuit's belief that tribal court judges who are not bound by the Constitution but must serve the "best interests of the Navajo Tribe" and who are untrained in the law are competent to interpret federal and state law in tribunal which are neither constituted by or authorized under Article III or any other constitutional provision. See, 710 F.2d. at 599.

The precedent of this Court further undercut the Ninth Circuit's belief that an award of $476.75 to one *defaulting* Indian and $4,455.75, to another for the same contractually authorized act of peaceful repossession is not penal. The Court has held that a penalty "include[s] *any extraordinary liability* to which the law subjects a wrongdoer in favor of the person injured, *not limited to the damages suffered.*" *O'Sullivan v. Felix,* 233 U.S. 318, 324 (1914) and authorities therein cited.

courts which do not accord the full protection of the Bill of Rights." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153-154 (1980).

Unlike the non-Indian parties in the numerous taxing and licensing cases which have come before the Court in recent years, Babbitt Ford does not voluntarily carry on any business on the reservation, does not benefit from tribal police protection or other governmental services, and does nothing which would justifiably require it to submit to tribal government. Indeed, while a non-member in the taxing and licensing cases may avoid paying the tax or obtaining the license by voluntarily choosing not to deal with the tribe or on the reservation, Babbitt Ford is compelled either to submit to tribal law and tribal court jurisdiction or abandon its security interest in the vehicle and the vehicle itself. These factors coupled with the Ninth Circuit's justification of tribal court jurisdiction over non-Indians upon the grounds of mere convenience to *defaulting* Indian purchasers indicate that the Ninth Circuit has ignored the teachings of *Montana* and *Oliphant* and has thus departed so far from the precedent of this Court that intervention through certiorari is essential.

C. *The Ninth Circuit's Decision is at Odds with the Language and Intent of the 1850 and 1868 Treaties Between the United States of America and the Navajo Indian Tribe.*

The Courts below superimposed upon the 1850 and 1868 Treaties with the Navajos a civil-criminal dichotomy to hold that, while these Treaties divest the Navajo tribe of jurisdiction over non-Indian in criminal matters, they do not divest it of civil jurisdiction over non-Indians in Navajo judicial tribunals with respect to matters whose factual center of gravity occurs off of the Navajo Indian Reservation. 519 F.Supp. at 426-427 (Appendix "B," pp. 36-38); 710 F.2d. at 595-597 (Appendix "A," pp. 12-17). We submit that neither the plain language of

these treaties nor the proceedings leading to their making permit such a construction.

Through plain, clear and simple terms specifying the rights, remedial forum, applicable law, and sole, adjudicating authority, Article I of the 1868 Treaty, 15 Stat. 667-668, divests the Navajo tribe of power to try non-Indians under tribal law. Article I provides that "if bad men among the whites, or among other persons subject to the authority of the United States" shall "commit *any wrong upon* the person or *property of an Indian,*" they will be "punished *according to the laws of the United States*" which will reimburse the injured person for the loss sustained." Under that same article, "the President may prescribe such rules and regulations *for ascertaining damages*" provided that "no such *damages shall be adjudicated and paid* until examined and passed upon by the Commissioner of Indian Affairs." Under Article IV, the United States Agency living among the Navajos is required to make "prompt and diligent inquiry into such matters of *complaint by or against the Indians*" and *"in case of depredations on* persons or *property, he shall have the evidence taken* in writing and forwarded together with his *findings*" to the Commissioner for final decision. 9 Stat. 667-668, emphasis added; Appendix "H," pp. 76-78.

The language of Article I and IV includes undeniably civil-law terminology and thus applies as forcefully to civil disputes between Indians and non-Indians as it does to criminal matters. The terms, "any wrong upon the person or property of an Indian," does not and cannot mean less than exactly that and is so broad that it includes any civil wrong committed by a non-Indian on an Indian, a fact which is confirmed by the executive power to prescribe rules "for ascertaining damages," to take "evidence" and make "findings" upon an Indian's "complaint." The equally plain and clear specification that the rule of decision in such disputes it to be the "laws of the United States" excluded all other kinds and sources of substantive law, including Navajo custom, practice, and legislation. To reason other-

wise, as do the Courts below, simply ignores the rule of this Court that "the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because . . . in the judgment of the court the Indians may have been overreached" or because in the court's view "the obvious and palpable meaning of the words of an Indian treaty . . . may in a particular transaction work what it regards as an injustice to the Indians." *United Stated v. Choctaw Nation*, 179 U.S. 494, 532-533 (1900); *Ute Indians v. United States*, 330 U.S. 169, 179-180 (1947); *Northwest Band of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945).

Moreover, the unpublished transcript of the proceedings of the council at which the 1868 Treaty was negotiated, explained and executed contains compelling evidence, ignored by the Ninth Circuit, that the Navajo tribe lacks power to regulate Indian–non-Indian disputes which transcend reservation boundaries. On the first day of the council, General Sherman explained to the Navajo Chief, Barboncito, that *"[y]ou [the Navajo people] can come to the [New] Mexico towns to trade"* since "[a]ny Navajo can now settle in this Territory and he will get a piece of land not occupied, *but he will be subject to the laws of the country."* During the second day of the council, General Sherman again stressed that *"any Navajo could go wherever he pleased in this territory* and settle with his family, *but if he did so [he] would be subject to the laws of the Territory as a citizen."* And, on the third day of the proceedings, in response to Barboncito's question respecting how Navajos should go about obtaining the return of Navajo children residing with or being held by off-reservation, non-Indians, General Sherman explained that *"you can apply to the judges of the Civil Courts* and the Land Commissioner" since *"[t]hey are the proper persons and they will decide* whether the Navajo is to go back to his own people or remain with the [N]ew Mexican." The Navajos acknowledged their understanding of these condi-

tions and agreed to them. *Proceedings of the Council With The Navajo Indians,* National Archives Treaty File No. 372, Document No. 2, 1st Day, p. 13; 2nd. Day, p. 1; 3rd. Day, p. 7, emphasis added [reproduced in Appendix "I," pp. 92, 94, 97-98.]

These clear statements that Indian–non-Indian *civil* controversies transcending reservation boundaries were not subject to tribal law or jurisdiction but only to that of the "judges of the Civil Courts" according "the laws of the Territory" could not be more plain and mirror similar statements made to the Navajos by Colonel Washington when the 1850 Treaty was executed. Colonel Washington told the Navajos that *"if any wrong is done them by a citizen* of the United States, or by a Mexican, he or they shall be punished *by the United States as if the wrong had been done by a citizen of the United States, and on a citizen of the United States."* Washington further told the Navajos "that the people of the United States shall go in and out of their country without molestation under such rules and regulations as shall be prescribed by the United States," not the Navajo tribe. The Navajos acknowledged their understanding of and agreement to these conditions, and they are embodied in Articles II, III, VI, VII of the 1850 Treaty, 9 Stat. 975-976. *S. Exec.Doc. No. 64,* 31st. Cong., 1st. Sess. (1850), pp. 89-90, emphasis added [reproduced in Appendix "G," p. 69].

This material illustrates the extent to which the Ninth Circuit departed from this Court's settled rules of treaty construction in order to accomplish the task, properly committed by law to Congress, of fashioning Indian policy. The Ninth Circuit should not be allowed to perform judicially a legislative function.

CONCLUSION

Based upon the foregoing, we submit that the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully Submitted,

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Attorneys for Petitioners

No.

OCTOBER TERM, 1983

IN THE SUPREME COURT OF THE UNITED STATES

BABBITT FORD, INC., an Arizona corporation,

Petitioner

vs.

THE NAVAJO INDIAN TRIBE, through its Chairman, PETER MacDONALD; THE NAVAJO TRIBAL COURTS, through its Chief Justice, NELSON J. McCABE; THE NAVAJO TRIBAL POLICE, through its Superintendent, WILBUR KELLOGG; TOM SELLERS and LORRAINE SELLERS, husband and wife; BARNEY JOE and ALICE JOE, husband and wife,

Respondents.

APPENDIX

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No.

OCTOBER TERM, 1983

IN THE SUPREME COURT OF THE UNITED STATES

BABBITT FORD, INC., an Arizona corporation,

Petitioner

vs.

THE NAVAJO INDIAN TRIBE, through its Chairman, PETER MacDONALD; THE NAVAJO TRIBAL COURTS, through its Chief Justice, NELSON J. McCABE; THE NAVAJO TRIBAL POLICE, through its Superintendent, WILBUR KELLOGG; TOM SELLERS and LORRAINE SELLERS, husband and wife; BARNEY JOE and ALICE JOE, husband and wife,

Respondents.

APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

APPENDIX "A"

OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-6054

BABBITT FORD, INC., an Arizona Corporation,
Plaintiff-Appellant,

v.

THE NAVAJO INDIAN TRIBE,
through its Chairman, Peter McDonald, et al.,
Defendants-Appellees,

and

No. 82-5002

TOM and LORRAINE SELLERS, et al.,
Defendants-Cross-Appellants.

No. 81-6052

GURLEY MOTOR COMPANY, a New Mexico Corporation,
Plaintiff-Appellant,

v.

PETER McDONALD,
individually and in his capacity as Chairman of
the Navajo Tribal Council, et al.,
Defendants-Appelles.

Appeal from the United States District Court
for the District of Arizona
C.A. Muecke, District Judge, Presiding
Argued and submitted February 16, 1983

Before:

MERRILL, CHOY, and ALARCON, Circuit Judges

Alarcon, Circuit Judge:

In these consolidated appeals, Babbitt Ford, Inc. (Babbitt), and Gurley Motor Company (Gurley), seek reversal of an order of the district court denying declaratory and injunctive relief from enforcement of certain of the Navajo Tribe's (the Tribe) vehicle repossession regulations. In their cross-appeal, Tom and Lorraine Sellers (Sellers) and Barney and Alice Joe (Joes) seek reversal of that portion of the district court's order enjoining the enforcement of the liquidated damages provision of the Navajo Tribe's regulation. We are asked to decide whether the Tribe has the sovereign power to enact and enforce civil laws regulating the conduct of non-Indians who come upon tribal land to repossess vehicles purchased outside reservation boundaries. We conclude that such power exists.

I.

Babbitt and Gurley raise the following issues on appeal: (1) the Navajo Tribe has been divested, by treaty and federal common law, of the power to regulate non-Indian repossessions conducted on the reservation; (2) the Navajo Tribe may not exercise tribal authority over non-Indians because the Tribe has neither adopted a constitution nor organized under the Indian Reorganization Act; and (3) the district court lacked the authority to reform the Navajo repossession regulation by severing the liquidated damages provision from the rest of the statute. In their cross-appeal, the Sellers and Joes contend that (1) the Navajo Tribe has jurisdiction to regulate the conduct of non-Indians on the reservation and (2) the civil damage provision of the Navajo law is a legitimate exercise of tribal power.

PERTINENT FACTS

Babbitt is an Arizona car dealership doing business in Page and Flagstaff, Arizona. Gurley is a New Mexico Corporation doing business in Gallup, New Mexico. Both automobile dealerships are located within close proximity to the Navajo Indian Reservation. Each derives a substantial part of its income from sales to members of the Tribe. All automobile sales contracts with the Indians are negotiated at the dealership. Delivery of the automobiles also occurs off the reservation. The majority of these sales involve loan contracts that give the dealer the right to repossession by self-help upon default. Babbitt states it exercises this right approximately ten times per month upon vehicles owned by members of the Tribe and kept within reservation boundaries.

In 1968, the Navajo Tribal Council enacted regulations governing self-help vehicle repossessions on the reservation. Sections 607 through 609 of the Navajo Tribal Code, 7 N.T.C. §§ 607-609 provide that (1) written consent is required for repossession from either the owner of the vehicle or the tribal court; (2) any party who willfully violates § 607 can be excluded from the reservation, and; (3) liquidated damages may be granted to any owner whose personalty is repossessed on the reservation in violation of 7 N.T.C. § 607.[1]

[1] 7 N.T.C. §§ 607-609 provide in full: § 607. Repossession of personal property. The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following: (1) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand. (2) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe, the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding. § 608. Violations—Penalty. (a) Any nonmember of the Navajo Tribe, except persons authorized by Federal law to be present on Tribal land, found to be in willful violation of

In 1980, Babbitt entered the Navajo reservation and repossessed the vehicles belonging to the Sellers and the Joes. In neither case did Babbitt attempt to comply with the consent requirement of § 607. Both the Sellers and the Joes brought suit in the tribal court for violation of § 607.

The tribal court found Babbitt to be in violation of 7 N.T.C. § 607, and granted the Sellers and the Joes damages in accordance with 7 N.T.C. § 609.[2] Babbitt appealed this decision to the Navajo Appeals Court before bringing this action in the district court. Although Gurley's repossessions had not been challenged in Navajo Court, the district court concluded that the litigation threatened by the Tribe against Gurley's manner of repossession was sufficiently imminent so as to be ripe for review. Gurley and Babbitt agreed to have their claims consolidated and the district court so ordered on December 1, 1980.

7 N.T.C. § 607 may be excluded from land subject to the jurisdiction of the Navajo Tribe in accordance with procedure set forth in 7 N.T.C. §§ 1903-1906. (b) Any business whose employees are found to be in willful violation of 7 N.T.C. § 607 may be denied the privilege of doing business on land subject to the jurisdiction of the Navajo Tribe. (c) Any Indian who violates any provision of 7 N.T.C. § 607 shall be guilty of a crime, and upon conviction shall be punished by a fine of not more than $100. § 609. Civil Liability. Any person who violates 7 N.T.C. § 607 and any business whose employee violates such section is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with 7 N.T.C. §§ 607-609. If the personal property repossessed is consumer goods (to wit: goods used or brought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the debt or the time price differential plus 10 percent of the cash price. Purchaser means the person who owes payment or other performance of an obligation secured by personal property, whether or not the purchaser owns or has rights in the personal property.

[2]The Sellers were awarded $476.75 and the Joes were awarded $4,455.75.

JURISDICTION

The district court premised subject matter jurisdiction upon the presence of a federal question pursuant to 28 U.S.C. § 1331. We agree with the district court's analysis. The question presented by these claims–the extent to which treaties and federal case law divest the Navajo tribe of the power to exercise civil jurisdiction over non-Indians conducting repossessions on reservation land–is a sufficient basis for § 1331 jurisdiction. *See Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, U.S. , 103 S.Ct. 293 (1982). *Cf. Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 n.4 (9th Cir. 1980) (this court affirmed dismissal on jurisdictional grounds but instructed district court to grant leave to plead § 1331 jurisdiction).

INHERENT POWER TO EXERCISE CIVIL JURISDICTION OVER NON-INDIANS

Indian tribes have long been recognized as sovereign entities, "possessing attributes of sovereignty over both their members and their territory . . . " *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (citations omitted). This sovereignty is not absolute. Tribal sovereignty is subject to limitation by specific treaty provisions,[3] by statute at the will of Congress,[4] by portions of the Constitution found explicitly binding on the tribes,[5] or by implication due to the tribes' dependent status.[6]

[3] *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Congress has the power to cancel unilaterally rights granted by Indian treaty. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903).

[4] *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 72 (1972) (Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which tribes otherwise possess, but Congress' intent to do so must be clearly expressed.)

[5] *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980).

Consequently, Indian tribes are "no longer 'possessed of the full attributes of sovereignty' . . ." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-66 (1978) (citations omitted). Nevertheless, Indian tribes "remain a 'separate people, with the power of regulating their internal and social relations,' . . . [making] their own substantive law in internal matters, . . . and . . . [enforcing] that law in their own forums[.]" *Id.* (citations omitted).

Indian tribes also retain the inherent sovereign power to exercise "some forms of civil jurisdiction over non-Indians on their reservations . . . " *Montana v. United States*, 450 U.S. 544, 565 (1981). The Supreme Court has repeatedly recognized tribal courts "as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara*, 436 U.S. at 65 (footnote and citation omitted). Tribal law-making institutions also have been recognized as competent legislatures. *Id.* at 66.

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on *fee lands* within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe . . .

Montana, 450 U.S. at 564-65 (1981) (emphasis added) (citations omitted).

[6] *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (the Indian Tribe's "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised") (footnote omitted).

The power to exercise tribal civil authority over non-Indians derives not only from the tribe's inherent powers necessary to self-government and territorial management, but also from the power to exclude nonmembers from tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44 (1982). This "limited authority" over nonmembers "does not arise until the nonmember enters the tribal jurisdiction . . . [by entering] tribal lands or [conducting] business with the tribe." *Id.* at 142. Nonmembers lawfully entering tribal lands–for example, pursuant to contract with the tribe–nonetheless remain "subject to the tribe's *power* to exclude them." *Id.* at 144 (emphasis in original). A tribe has the power "to place conditions on entry, on continued presence, or on reservation conduct . . . , [and] nonmember[s] who [enter] the jurisdiction of the tribe [remain] "subject to the risk that the tribe will later exercise [this] sovereign power." *Id.* at 144-45 (footnote omitted).

Thus, in *Merrion* the Supreme Court concluded that the Jicarillo tribe had the power to impose a severance tax on non-Indians conducting mining activities on the reservation pursuant to a contract with the tribe. In *Montana*, the Court concluded that a tribe may exclude nonmembers from hunting on reservation land or condition permission to hunt by charging a fee or establishing limitations. 450 U.S. at 557. The *Montana* Court held, however, that the tribe could not prohibit nonmembers from hunting on fee lands located within reservation boundaries that were owned by nonmembers. *Id.* at 566-67.

The *Montana* Court offered three reasons for this distinction. First, the non-Indians, who were hunting and fishing on non-Indian fee lands, had not "[entered into] any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." *Id.* at 556. Second, there had been no suggestion that the hunting and fishing activities on non-Indian fee land so "[threatened] the Tribe's political or economic security as to justify tribal regulation." *Id.* Finally, the complaint had failed to allege that such activities "[imperiled] the

subsistence or welfare of the Tribe." *Id.* (footnote omitted). In sum, the nonmembers had not entered the jurisdiction of the Crow Tribe.

Recent decisions of this Circuit have upheld the enforcement of tribal economic and health and welfare regulations against nonmembers present on the reservation or transacting business with the tribe. *See, e.g., Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.) (tribe retains inherent sovereign power to impose its health, building, and safety regulations on non-Indian's business, which is located on land that non-Indian owns in fee, but also is within reservation boundaries), *cert. denied*, U.S. , 103 S.Ct. 293 (1982); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.) (court upheld tribe's right to regulate federal common-law riparian rights of non-Indians who owned reservation land to which the tribe had beneficial title), *cert. denied*, U.S. ' 103 S.Ct. 314 (1982); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1981) (court held as valid exercise of tribal power zoning regulation that affected fee lands owned by non-Indians located within reservation).

Congress has acknowledged that such regulation is a necessary tool of self-government and control. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980) (There is a "general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs' ") (quoting *Mescalaro Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)). As the Supreme Court noted, the Senate Judiciary Committee "as early as 1879" stated:

> We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government, *they may enact the requisite legislation to maintain peace and good*

> *order, improve their condition*, establish school systems, and aid their people in their efforts to acquire the arts of civilized life.

S. Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (emphasis added) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1981)).

The Navajo consent regulation at issue in this matter is a necessary exercise of tribal self-government and territorial management: the regulation is designed to keep reservation peace and protect the health and safety of tribal members. The Navajo reservation covers a vast expansion of land. Repossession of an automobile has the potential to leave a tribal member stranded miles from his or her nearest neighbor. A repossession without the consent of the tribe member also may escalate into violence, particularly if others join the affray.

Such conduct, in our view, clearly "threatens or has some direct effect on the . . . health and welfare of the tribe." *Montana*, 450 U.S. at 566 (citations omitted). The enactment of regulations aimed at preventing such occurrences reflects the Tribe's concern for the safety and welfare of persons on the reservation. For this reason, the regulations at issue here are a valid exercise of tribal jurisdiction according to the principles set forth in *Montana*.

Merrion provides yet another basis for upholding the exercise of tribal civil jurisdiction over non-Indians repossessing automobiles on Navajo reservation land. As noted earlier, the "limited authority" over nonmembers does not arise until they enter tribal lands or conduct business with the tribe. *Merrion*, 455 U.S. at 142. *See also Montana*, 450 U.S. at 564 (tribe may regulate activities of nonmembers, "who enter consensual relationships, with the tribe or its members, through commercial dealing, contracts, leases or other arrangements") (citations omitted). Both Babbitt and Gurley conduct business with tribal members, and they must enter tribal lands to repossess the subject of that business–automobiles. By doing so, they have entered the Tribe's jurisdiction.

The Navajo Tribe could have completely excluded the representatives of Babbitt and Gurley from entering the reservation. *Merrion*, 455 U.S. at 144. Instead it chose to condition entry to repossess vehicles upon obtaining permission of the Tribe or the individual car owner to do so. As noted earlier, the Tribe has the "power to place conditions on entry, on continued presence, [and] on reservation conduct . . . " *Id.* Regulating the conduct of non-Indians repossessing automobiles on reservation land is a valid exercise of the Tribe's power to exclude nonmembers from the reservation. *See Quechan Tribe of Indians v. Rome*, 531 F.2d 408, 410 (9th Cir. 1976) ("In the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the inherent power to exclude non-members from the reservation.") (citing *Williams v. Lee*, 358 U.S. 217, 219 (1959); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1833).

Babbitt neverthless contends that it did not consent to the Tribe's exercise of civil jurisdiction because it did not conduct business with the Tribe, but only with individual Indians. This notion of individuality was put to rest succinctly by the Supreme Court in *McClanahan*. In rejecting the view that a state law imposing income tax on individual Indians did not affect the Tribe, the Court stated: "when Congress legislates on Indians matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights." 411 U.S. at 181. *Cf. Littell v. Nakai*, 344 F.2d 486, 490 (9th Cir. 1965) (Navajo Tribe need not have a proprietary or other legally recognized interest in the particular litigation or its outcome in order for the controversy to be one concerning internal affairs), *cert. denied*, 382 U.S. 986 (1966).

Babbitt additionally maintains that the Tribe has no civil jurisdictional authority over Babbitt's repossession conduct on the reservation because the sales contracts were entered into off the reservation land. Babbitt further argues that it is immune from the Tribe's civil repossession laws because the sales con-

tracts gave Babbitt the right to enter the Navajo reservation to conduct repossessions in accordance with Arizona law. We disagree.

In *Merrion*, 455 U.S. 130 (1982), the Supreme Court rejected an argument similar to the one advanced by Babbitt. The petitioners, who in 1953 had entered into mineral leases with the Tribe, challenged the Tribe's power to tax their activities. They argued that their leaseholds entitled them to enter the reservation and exempted them from further exercises of the Tribe's sovereign power. 455 U.S. at 145. The Court characterized the argument as one that "[confused] the Tribe's role as commercial partner with its role as sovereign." *Id.* at 145-46. The Court explainted that:

> *Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority.* Requiring the consent of the entrant deposits in the hands of the excludable non-Indians the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority . . . *Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.*
>
> Viewed in this light, the absence of a reference to the tax in the leases themselves hardly impairs the Tribe's authority to impose the tax. Contractual arrangements remain subject to subsequent legislation by the presiding sovereign . . . *Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction,* and will remain intact unless surrendered in unmistakable terms.

Id. at 147-48 (citations and footnotes omitted) (emphasis added).

The Court made clear that the mere existence of a "lawful property right to be on Indian land" does not immunize the non-Indian from the tribe's power "to place other conditions on the non-Indian's conduct or continued presence on the reservation." *Id.* at 144-45 (footnote omitted). Those entering the tribe's jurisdiction remain "subject to the risk that the tribe will later exercise its sovereign power." *Id.* at 145. Thus, by entering the reservation to conduct repossessions, Babbitt and Gurley are subject to the Tribe's exercise of sovereign power.[7] The Tribe has the authority to exercise civil jurisdiction over Babbitt and Gurley.

II. DIVESTURE OF CIVIL JURISDICTION

A.

Babbitt and Gurley argue that the 1850 and the 1868 treaties between the Navajo Tribe and the United States divest the Tribe of the power to regulate trade and intercourse. Thus, we are told, the plain language of these treaties prohibits the Tribe from exercising civil jurisdiction over non-Indians.

The treaty language at issue provides in pertinent part:

> Treaty of 1850: (Article III) The government of the said states having the sole and exclusive right of regulating the trade and intercourse with the said Navajos . . .
>
> Treaty of 1868: If bad men among the whites or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the

[7] *See also Littell v. Nakai*, 344 F.2d 486, 490 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966). There, this court rejected the argument that since some of the alleged acts between the non-Indian and Indian occurred off the reservation, the tribal court had no jurisdiction over the non-Indian. The locus of some particular act, we held, is not conclusive as to tribal jurisdiction.

> agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

Both Babbitt and Gurley contend that the "sole and exclusive" language of the 1850 Treaty means that only the United States and not the Navajo Tribe may regulate in the area of trade and intercourse.

Babbitt additionally argues that the words "bad men among the Whites" in the 1868 Treaty require the Navajo Tribe to relinguish all civil jurisdiction over non-Indians. Babbitt asserts that, upon signing this Treaty, disputes with non-Indians became subject to the jurisdiction of the United States.

The district court, in a concise analysis, rejected an interpretation of the Treaties that would divest the Navajos of civil jurisdiction over non-Indians *present* on the reservation. Noting that neither Babbitt nor Gurley introduced evidence of the history of the 1850 or 1868 Treaty, the district court found no reason to reject an interpretation favoring concurrent civil jurisdiction on the part of the Tribe and the federal government.[8] We agree. Furthermore, in light of previous Supreme Court interpretations of the Treaties at issue in this appeal, the arguments of Babbitt and Gurley are meritless.

The law is settled that simply because a Treaty fails to delineate specific powers of a tribe does not mean that the tribe has been divested of such powers. *See, e.g., United States*

[8]Gurley correctly argues that historical evidence of tribal custom is a proper basis for judicial conclusions about the present effect of Indian treaty provisions. *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1145 (9th Cir.) (citations omitted), *cert. denied*, 454 U.S. 862 (1981). Gurley, however, never presented any such evidence to the district court before the court entered its final judgment permanently enjoining enforcement of section 609. The hearing on the preliminary injunction was consolidated with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

v. Wheeler, 435 U.S. 313 (1978); *McClanahan v. Arizona State Tax Commision*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959). The Supreme Court "has referred to Treaties made with the Indians as *'not a grant of rights to the Indians*, but a grant of rights from them—*a reservation of those not granted.'* " *Wheeler*, 435 U.S. at 327 n.24 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905) (emphasis added)).

In *Wheeler*, the Supreme Court examined the 1850 and 1868 Treaties between the United States and the Navajo Tribe and concluded that the Tribe and the government had concurrent jurisdiction to punish Indians for violations of tribal law.[9] The Court stated that "[a]lthough both of the Treaties . . . provided for punishment by the United States of Navajos who commit crimes against non-Indians, nothing in either of them deprived the Tribe of its own jurisdiction to charge, try, and punish members of the Tribe for violations of tribal law." 435 U.S. at 324. The notion that the internal affairs of Indians remained exclusively within the jurisdiction of whatever tribal government existed, the Court asserted, is an understanding " '[i]mplicit in these Treaty terms . . . ' " *Id.* (citations omitted).[10]

In *McClanahan*, 411 U.S. 164 (1973), Arizona argued that it could tax individual Navajos living on the reservation because the 1868 Treaty failed to provide expressly that the State of

[9]Here, however, jurisdiction is limited to civil jurisdiction. This result is due to the holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) that Indians lack criminal jurisdiction over non-Indians.

[10]Of course, "in the exercise of the powers of self-government as in all other matters, the Navajo tribe . . . remains subject to ultimate federal control." *United States v. Wheeler*, 435 U.S. 313, 327 (1978). Such control, however, does not create the Indian's power to govern themselves. *Id.* at 328. "That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power." *Id.*

Arizona could not do so. In rejecting this argument, the Court notes that even though the Treaty did not explicitly state that Navajos were to be free from state law or exempt from state tax, the Court had "interpreted the Navajo Treaty to preclude extension of state law–including state tax law–to Indians on the reservation." 411 U.S. at 175 (citations omitted). The Treaty, the Court explained, "is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions." *Id.* at 174. The Navajos promised to keep the peace and, in return, the Treaty reserved certain lands for their exclusive use and occupancy and for exclusion on non-Navajos. "[C]ircumstances such as these . . . have led [the] Court in interpreting Indian treaties, to adopt the general rule that '[d]oubtful expressions are to be resolved in favor of [the Indians] . . .'" *Id.* (citation omitted).

This canon of construction, taken together with the tradition of Indian independence, led the Supreme Court to conclude that the reservation of certain lands to the Navajos "was meant to establish the lands as within the *exclusive sovereignty of the Navajos under general federal supervision.*" *Id.* at 175 (emphasis added). Accordingly, the Court held that absent congressional consent, Arizona could not impose a state income tax on income earned by a reservation Indian solely on the reservation.

In *Williams v. Lee*, 358 U.S. 217 (1959), the Court examined the 1868 Navajo Treaty and concluded that the Tribe had exclusive jurisdiction over a collection action brought by a non-Indian against individual Indians. The plaintiff, a non-Indian who operated a store on reservation lands, instituted the action in state court for goods sold on credit to the Indians. The Court determined that the exercise of state jurisdiction would infringe on the Tribe's right to self-government a right recognized by Congress in the 1868 Treaty. In reaching this conclusion Court noted that:

> Implicit in [the] treaty terms [providing that no one was to enter the land permanently set apart for the Navajos except government personel] was the understanding that the internal affairs of the Indians remained exclusively with the jurisdiction of whatever tribal government existed. Since then Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts.

Id. at 221 (citation omitted).

In the Court's view, there could be "no doubt" that the exercise of state jurisdiction "would undermine the authority of the tribal courts over Reservation Affairs," thereby infringing on the Indians' right to govern themselves. *Id.* at 223. The Court characterized as "immaterial" the fact that the plaintiff was a non-Indian. The Court reasoned that:

> *[h]e was on the Reservation* and the transaction with an Indian took place there . . . Congress recognized [the Navajo's] authority [over their reservation] in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it . . .

358 U.S. at 223 (emphasis added) (citations omitted).

The Court's reasoning is equally applicable here. The transaction regulated—repossession of automobiles on reservation land—occurs *on* the reservation. The fact that the contract was signed off the reservation does not foreclose, as Babbitt suggests, the Tribe's right to self government or the authority of tribal courts over reservation affairs. *Cf. Merrion*, 455 U.S. at 144 (lawful property right to be on Indian land does not immunize non-Indian from Tribe's power to place conditions on non-Indian's conduct or continued presence on reservation).

Williams, *McClanahan*, and *Wheeler* support our determination that the Navajo treaties have not divested the Tribe of the power to exercise civil jurisdiction over non-Indians. The

tradition of Indian independence, coupled with the general rule that " 'doubtful [treaty] expressions are to be resolved in favor of [the Indians], *McClanahan*, 411 U.S. at 174 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)), has led the Supreme Court to conclude that the reservation of land to the Navajos by these treaties establishes Navajo lands as within the exclusive sovereignty of the Tribe under general federal supervision. *Id.* at 175. Nothing in the language of either treaty quoted by Babbitt and Gurley leads us to believe that we may overlook the Supreme Court's interpretation of these treaties.

B.

Both Babbitt and Gurley argue that the Tribe's exercise of civil jurisdiction here is inconsistent with overriding national interests. Citing *Montana*, 450 U.S. 544 (1981) and *Oliphant v. Suguamish Indian Tribe*, 435 U.S. 191 (1978), Babbitt contends that "the nonexistence of Indian tribal civil jurisdiction over non-Indians constitutes the general rule of the federal common law and the existence of any such jurisdiction would constitute an exception to that rule."[11] Babbitt asserts that the regulations at issue here are outside any such exception.

In our view, the Tribe's exercise of civil jurisdiction over non-Indians conducting repossession on reservation land is not within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The Supreme Court has implied divestiture of sovereign powers where the Tribes' dependent status is necessarily inconsistent with the Tribe's "freedom independently to determine [its] external relations." *Wheeler*, 435 U.S. at 326. Thus, Indian Tribes may no longer (1) freely alienate to non-Indians the land they occupy, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974); (2) enter into direct commercial or govern-

[11] Babbitt's opening brief at 28.

mental relations with foreign nations, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1833); (3) criminally prosecute non-members in tribal courts which do not accord the full protection of the Bill of Rights, *Oliphant*, 435 U.S. 191, 210-12 (1978); or (4) exercise civil authority over the conduct of non-Indians on fee lands within the reservation (lands not owned by the Tribe) if such conduct does not threaten or does not have a direct effect on the political integrity, economic security, or health and welfare of the Tribe. *Montana*, 450 U.S. at 565-66.

In *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, U.S. , 103 S.Ct. 293 (1982), we addressed a similar argument concerning *Montana*, *Olphant* and implicit divestitures of sovereign power. There, the Quinault Indian Tribe had obtained and enforced a tribal court order closing plaintiff's reservation grocery store for violations of the tribal health and safety code. Plaintiff, a non-Indian, brought an action in district court seeking injunctive relief from the enforcement of the tribal court order and a ruling that such orders were outside the retained jurisdiction of the Tribe. The district court granted the relief and the Tribe appealed. This court reversed, holding that the Tribe did retain the civil jurisdiction over non-Indians necessary to enforce their health and safety regulations. Although the plaintiff argued that *Montana* and *Oliphant* prohibited such a conclusion, we declined to apply these holdings so broadly. We reasoned that:

> [t]o hold that Indian tribes cannot exercise civil jurisdiction over non-Indians would, when combined with *Oliphant*, eliminate altogether any tribal jurisdiction over persons not members of the tribe, and thus, reduce to a nullity the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory, not just their members.

Id. at 366 (footnote omitted); *see also Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962-64 (9th Cir.)

(water pollution regulations "falls squarely within the exception recognized in *Montana*"), *cert. denied*, U.S. , 103 S.Ct. 314 (1982).

In our view, *Cardin's* reasoning is applicable to the enforcement of the repossession regulations at issue here. These regulations are a legitimate exercise of the Tribe's inherent powers. Civil jurisdiction to enforce these regulations is a necessary exercise of tribal self-government and territorial management. The limitation on tribal authority over nonmembers does not derive from an implicit divestiture of sovereign power as Babbitt contends. Rather, the limitation stems from the "significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." *Merrion*, 455 U.S. at 142. This limitation has no application where, as here, a nonmember conducts both business with individual Indians and repossessions on reservation lands.

C.

Gurley, in a related argument, contends that even if the Tribe has the power to exercise civil jurisdiction, it may not do so unless it has adopted a Constitution pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 476, 477 (IRA) and has obtained the approval of the Secretary of the Interior. Absent these restrictions, "non-Indians will be subject once again—as they were before the treaties of 1850 and 1868—to the unlimited, unfettered and often unfair exercise of authority by the Navajo Tribe."[12]

Gurley maintains that there are no constraints on the Navajo Tribe to ensure that tribal actions comport with due process of law because (1) the Tribe has never adopted a constitution which places a due process limitation on the exercise of tribal power; and (2) the due process limitations set forth in the United States Constitution are inapplicable to Indian tribes,

[12]Gurley's opening brief at 15.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Gurley correctly notes that, in *Merrion*, the Supreme Court referred to secretarial approval and the Federal Government's ultimate power to take away a Tribe's power to tax as constraints that "minimize [the] potential concern that Indian tribes will exercise the power to tax [unfairly] . . . and ensure that any exercise of the tribal power to tax will be consistent with national policies." 455 U.S. at 141.

Similar constraints are present here. Congress may take away the Tribe's power to regulate repossessions conducted on reservation land. Moreover, tribal courts must comply with the Indian Civil Rights Act, 25 U.S.C. § 1302, which grants constitutional protections to those who are subject to the Tribe's jurisdiction.[13] A non-Indian who has been denied due process in the tribal court may seek habeas corpus relief in the district court. Under these circumstances, we do not believe that the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government.

We also reject Gurley's view that *Merrion* requires the Tribe to adopt a constitution pursuant to the IRA before it can exercise civil jurisdiction over non-Indians. In *Merrion*, the Supreme Court rejected the view that a tax imposed by a tribe on non-Indian mining activities on the reservation would unduly burden interstate commerce and thus violate the Interstate Commerce Clause. In reaching this conclusion, the Court noted that judicial review of a state tax under the Interstate Commerce Clause is improper once Congress has acted. 455 U.S. at 154. The Court explained:

> Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect. Under the [IRA] . . . , a tribe must obtain approval from the Secretary before it adopts or

[13] *See United States v. Wheeler*, 435 U.S. 313, 327-28 (1978). No claim has been made that the tribal action here was in violation of the Indian Civil Rights Act.

> revises its constitution to announce its intention to tax non-members. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe was required again to obtain approval from the Secretary..

Id. at 155 (footnote and citations omitted).

Thus, the Court did not hold, as Gurley suggests, that such federal checkpoints are required for the *exercise* of all tribal regulations. Rather, the Court held that it was not the function of the judiciary "to strike down a tax that has traveled through the precise channels established by Congress, and has obtained the specific approval of the Secretary." *Id.* at 156. Neither *Merrion* nor the language of the IRA requires a tribe to adopt a constitution before exercising civil jurisdiction over non-Indians.[14]

D.

In their cross-appeal, the Sellers and the Joes contend the district court erred in holding that the regulatory damage provision of section 609 conflicts with overriding interests of the federal government.[15] We agree.

[14]The IRA provides in pertinent part: Any Indian tribes, residing on the same reservation, shall have the right to organize for its common welfare, and *may* adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservations, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws. 25 U.S.C. § 476. (emphasis added). The IRA "[reflects] a new policy of the Federal Government and [aims] to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes *were encouraged* to revitalize their self-government through the adoption of constitutions and bylaws . . . " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

Section 609 provides that any person who repossesses goods in violation of section 607 is deemed to have breached the peace and "shall be civilly liable . . . for any loss caused [thereby] . . . " 7 N.T.C. 609.[16] If "consumer goods" are repossessed in violation of section 607, the purchaser of such goods may recover either (1) actual damages or (2) in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price." 7 N.T.C. 609.

The district court concluded that the validity of section 609 depended on whether it was compensatory or penal in nature. The district court construed *Oliphant* as prohibiting tribal regulations that conflict with the overriding national interest in "protect[ing] United States citizens from 'unwarranted intrusions on their personal liberty.' " 519 F. Supp. at 431 (citations omitted). Unwarranted intrusions, the district court noted, are more likely to occur when "the purpose is to punish than when the purpose is to compensate." *Id.* Thus, the district court reasoned that section 609 would be invalid to the extent that it was penal in nature. *Id.* at 432.

To determine the nature of section 609, the court adopted an analysis employed in contract actions concerning the validity of contested liquidated damage provisions. In the court's view, the similarity between the minimum damage provision of section 609 and a liquidated damage contract clause justified application of the analysis to the provision.

In applying this analysis, the district court noted that liquidated damage provisions became penal when they over-

[15] In view of our decision to reverse this portion of the judgment, we need not address Babbitt's argument that the court was without power to sever § 609 from the rest of the regulation. We also note that neither party challenges 7 N.T.C. § 608 which codifies the power of the Tribe to exclude violators of 7 N.T.C. § 607.

[16] The Tribe's statutory format, which presumes a breach of the peace, parallels § 9-503 of the Uniform Commercial Code.

compensate the wrong to which they are directed. 519 F. Supp. at 433. In the court's view, section 609 overestimates the right, and therefore is penal in nature, where the repossession is "substantively justified by the parties' contract and the applicable law thereto." 519 F. Supp. at 433. In such instances, the Indian is only deprived of the right "not to have his vehicle repossessed until the dealer complies with § 607." *Id.* Accordingly, the provision is "inconsistent with overriding [federal] interests . . . since it awards damages in excess of the damage actually suffered . . . and, therefore, punishes non-Indians." *Id.* Such punishment, the court asserted, is beyond the limits of tribal sovereign power according to *Oliphant.*

In our view, the district court's reliance on a contract law is misplaced. The issue presented by these appeals is the validity of an exercise of legitimate sovereign authority. Section 609 is not a liquidated damage provision agreed upon by parties to a contract; consequently, its validity is not to be measured by common law limitations on *contractual* agreements. "Only the Federal Government may limit a tribe's exercise of its sovereign authority." *Merrion,* 455 U.S. at 147 (citation and footnote omitted).

We believe that the district court has interpreted the limitation set forth in *Oliphant* too broadly. In *Oliphant,* the Supreme Court held that a tribe's criminal prosecution of non-Indians in tribal courts that do not accord the full protections of the Bill of Rights conflicts with overriding national interests. *See Olipant,* 435 U.S. at 210. Section 609 does not subject non-Indians to criminal prosecution in tribal courts that do not afford that protection of the Bill of Rights. Rather, section 609 subjects non-Indians to civil damages when they enter the reservation and repossess personal property without complying with the consent provision of section 607.

Tribal power includes "a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. at

153. By enacting § 609 the Tribe has furthered its social policy to prevent violence in the repossession of automobiles. This same protection against breaches of the peace has been made a part of the law of many states; the provisions of section 609 concerning mandatory minimum award without proof of actual damages are not unique. The language of § 609 closely parallels other attempts at consumer protection legislation,[17] and is in fact identical to the damage measure set out in § 9-507(1) of the Uniform Commercial Code (U.C.C.). This U.C.C. code section has been adopted without material modification by both Arizona, Ariz. Rev. Stat. Ann. § 44-3153 (1967), and New Mexico, N.M. Stat. Ann. § 55-9-507 (1978).

Numerous cases have held that under U.C.C. § 9-507(1) an improper auto repossession results in liability for the statutory minimum. In each of these cases, proof of creditor's failure to give notice of resale, just as under § 609 proof of the creditor's failure to obtain consent, is considered sufficient to support the minimum damage award. None of these cases require a showing of actual damage and all of the cases consider an automobile to be a consumer good.[18] Those states that have adopted § 9-507(1) of the U.C.C. have acted to protect the safety and property of all persons within their boundaries. The adoption of § 609 realistically increases the likelihood of achieving these same goals.

The district court's judgment is affirmed in part and reversed as to § 609.

[17] *See, e.g.*, 15 U.S.C. § 1640(a)(2)(A), the civil liability section of the Truth in Lending Act and § 5.203(1)(a) of the Uniform Consumer Credit Code.

[18] *See, e.g., Garza v. Brazos County Federal Credit Unit*, 603 S.W. 2d 298 (Tex. Civ. App. 1980); *Georgia Central Credit Union v. Coleman*, 155 Ga. App. 547, 271 S.E. 2d 681 (1980); *Allard v. Ford Motor Credit Co.*, 139 Vt. 162, 422 A.2d 940 (1980); *Wells v. Central Bank of Alabama, N.A.*, 347 So. 2d 114 (Ala. Civ. App. 1977). *But see Wilmington Trust Co. v. Conner*, 28 UCC 900, 415 A.2d 773 (Del. 1980) (award of the UCC § 9-507(1) minimum must be based on proof that the particular automobile repossessed was a consumer good; since this factor cannot be presumed and no evidence on the issue was received, the court reversed and remanded for further proceedings).

APPENDIX "B"

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-686 PCT CAM

BABBITT FORD, INC., an Arizona corporation
Plaintiff,

vs.

THE NAVAJO INDIAN TRIBE,
through its Chairman, Peter MacDonald, et al.,
Defendants.

No. CIV 80-925 PHX CAM

GURLEY MOTOR COMPANY,
a New Mexico corporation,
Plaintiff,

vs.

PETER MacDONALD, individually and
in his official capacity as Chairman of
the Navajo Tribal Council, et al.,
Defendants.

OPINION AND ORDER

Plaintiffs herein are automobile dealers. Plaintiff Babbitt Ford (Babbitt) is an Arizona corporation doing business in Flagstaff, Arizona. Plaintiff Gurley Motor Company (Gurley) is a New Mexico Corporation doing business in Gallup, New Mexico.[1]

By virtue of their close proximity to the Navajo Indian Reservation, both plaintiffs enjoy a significant business from members of the Navajo Tribe. From time to time, plaintiffs' Navajo customers have defaulted on their obligations.[2] In such instances, plaintiffs have exercised their rights under state law and have peacefully repossessed their vehicles.

In 1968, the Navajo Tribal Council enacted 7 N.T.C. § 607, which provides as follows:

> § 607. Repossession of personal property
>
> The personal property of Navajo Indian shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following:
>
> (1) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand.
>
> (2) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe, the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding.

[1] Plaintiffs' complaints were filed separately. Since each raised similar issues of law, they were consolidated by Court Order on December 1, 1980.

[2] Plaintiff Gurley alleges that it has repossessed 1,500 vehicles over the past six years. Plaintiff Babbitt alleges that it repossesses approximately ten vehicles per month within the boundaries of the Navajo Reservation.

To enforce the above provision, the Tribal Council enacted §§ 608 and 609:

§ 608. Violations–Penalty

(a) Any nonmember of the Navajo Tribe, except persons authorized by Federal law to be present on Tribal land, found to be in willful violation of 7 N.T.C. § 607 may be excluded from land subject to the jurisdiction of the Navajo Tribe in accordance with procedure set forth in 17 N.T.C. §§ 1903-1906.

(b) Any business whose employees are found to be in willful violation of 7 N.T.C. § 607 may be denied the privilege of doing business on land subject to the jurisdiction of the Navajo Tribe.

(c) Any Indian who violates any provision of 7 N.T.C. § 607 shall be guilty of a crime, and upon conviction shall be punished by a fine of not more than $100.

§ 609. Civil Liability

Any person who violates 7 N.T.C. § 607 and any business whose employee violates such section is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with 7 N.T.C. §§ 607-609.

If the personal property repossessed is consumer goods (to wit: goods used or brought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

Purchaser means the person who owes payment or other performance of an obligation secured by personal property, whether or not the purchaser owns or has rights in the personal property.

Plaintiffs argue that 7 N.T.C. § 607 *et seq.* constitutes an attempt by an Indian tribe to assert civil and criminal jurisdiction over a non-Indian and that, as such, these ordinances are invalid and unenforceable. Plaintiffs move for a declaratory judgment to this effect and further, for an order permanently enjoining defendants from attempting to enforce their ordinances.

Present Status

On February 9, 1981, this Court held oral argument on the following motions: plaintiff Babbitt's motion for preliminary injunction (filed August 27, 1980), defendant Seller's and defendant Joe's motion to dismiss Babbitt's complaint (filed September 29, 1980), defendant Navajo Tribe's motion to dismiss Babbitt's complaint (filed October 7, 1980), and defendant Navajo Tribe's motion to dismiss plaintiff Gurley's complaint (filed January 9, 1981).

At the Court's suggest, plaintiff Babbitt and the defendants agreed that Babbitt's motion for preliminary injunction could be treated as a request for a permanent injunction under Rule 65(a)(2), Federal Rules of Civil Procedure.

Following argument, the parties were given the opportunity to submit additional briefs. Several such briefs have been filed, and this matter is now ready for disposition.[3]

Issues

The primary questions raised in defendants' motions to dismiss are:

(a) whether plaintiffs' claims are ripe for adjudication;

(b) whether plaintiffs' complaints allege a sufficient basis for federal jurisdiction;

(c) whether plaintiffs' claims are barred by sovereign immunity;

(d) whether plaintiffs' complaints state a claim upon which relief can be granted.

[3] The United States has filed a brief as Amicus Curiae.

Case or Controversy

It is undisputed that two of Babbitt's Navajo customers have obtained tribal court judgments against Babbitt pursuant to 7 N.T.C. § 609. Although plaintiff Gurley cannot say as much, it does allege that "over the last two months, a number of Indians, whose motor vehicles have been repossessed, have threatened to initiate civil litigation against plaintiff in tribal court." Gurley Complaint at ¶ 19.

The Tribe argues that Gurley has failed to state a case or controversy for the reason that Gurley has not been the subject of a § 609 judgment. Babbitt's complaint is alleged to be deficient for the reason that the Indians who have obtained § 609 judgments have not successfully executed them. Neither of the Tribe's contentions can be sustained.

In order to satisfy the case or controversy requirement imposed by Art. III of the Constitution, plaintiffs are under a burden to

> 'allege some threatened or actual injury resulting from the putatively illegal action . . . ' Linda R.S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). There must be a 'personal stake in the outcome' such as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d. 663 (1962) . . . It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged . . . conduct. Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' Golden v. Zwickler, 394 U.S. 103, 109-110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969).

O'Shea v. Littleton, 414 U.S. 491, 494, 94 S.Ct. 669, 675 (1974).

From the foregoing language, it is apparent that Babbitt's allegations that it has suffered two § 609 judgments satisfy Article III. Babbitt need not allege actual and direct injury in order to state a case or controversy. It is enough that injury be imminent. *See e.g. Babbitt v. United Farm Workers*, 442 U.S. 289, S.Ct. (1979); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658 (1923).

Since Gurley has been able to avoid § 609 litigation, this Court's conclusions as to Babbitt do not necessarily end the inquiry. Nevertheless, Gurley's complaint cannot be viewed in a vacuum. In light of the Babbitt judgments, for the Tribe to argue that Babbitt's co-plaintiff is not threatened with similar treatment seems frivolous. Moreover, Gurley has alleged that it has been subjected to harassment by defendant Tribe and that tribal members have threatened litigation. Viewed in this context, Gurley stands in substantially the same position as Babbitt.

Subject Matter Jurisdiction

The Ninth Circuit's most recent analysis of federal jurisdiction over disputes between Indians and non-Indians appeared in *Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (1980). At issue in *Trans-Canada* was the Tribe's ability to enforce a business licensing ordinance against certain non-Indians by means of a civil enforcement action in Tribal Court. In response to the Tribe's attempts, the non-Indians brought suit in federal district court seeking injunctive and declaratory relief. The Ninth Circuit refused assistance, holding that plaintiffs had not carried their burden of establishing federal jurisdiction.

Trans-Canada is relevant to the present case in that it disposes of two of plaintiffs' jurisdictional contentions: federal

question jurisdiction under *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773 (1946), and statutory jurisdiction under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303.[4]

Unlike plaintiffs in *Trans-Canada*, however, plaintiffs in this case have alleged jurisdiction pursuant to 28 U.S.C. § 1331, the general federal question statute. The *Trans-Canada* Court specifically withheld comment on whether § 1331 would have vested the district court with jurisdiction:

> We . . . decline to rule on the issue whether § 1331 is an appropriate jurisdictional vehicle in cases wherein Indian tribes or their officers are defendants. However, we instruct the district court to grant leave to amend upon remand.

Trans-Canada, supra at n. 4. Given plaintiffs' assertion of § 1331 jurisdiction, this Court is required to answer the question that *Trans-Canada* did not reach.

28 U.S.C. § 1331

It has long been established that "Indian tribes are no longer 'possessed of the full attributes of sovereignty.' " *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086 (1978).

At the core of plaintiffs' complaints is a question that has frequently been the subject of federal disputes, namely, the extent to which an Indian tribe can assert jurisdiction over non-Indians. *See e.g., Montana v. United States*, U.S. (March 24, 1981); *Washington v. Confederated Tribes of Colville*, U.S. , 100 S.Ct. 2069 (1980); *United States v. Wheeler, supra*, 98 S.Ct. at 1079; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011 (1978); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959).

In cases involving the exercise of tribal power over non-Indians, the Courts have first examined the tribe's treaty to see whether the power in question has been granted or relinquished. *See Montana vs. United States, supra; Oliphant v. Suquamish Indian Tribe, supra.* Next, the Courts have looked to federal statutes to determine whether Congress, with its plenary control

in this area, has affected tribal power. *See Washington v. Confederated Tribes, supra* at 2082. Absent a clear answer from these sources, the Courts have examined the area of inherent tribal sovereignty, the boundaries of which are a matter of federal common law. *See e.g. Montana v. United States, supra; Oliphant v. Suquamish Indian Tribe, supra; Washington v. Confederated Tribes, supra.*

That federal question jurisdiction under 28 U.S.C. § 1331 can be based on federal common law is well-settled. *See Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91, 99-100, 92 S.Ct. 1385, 1390-91 (1972).

Under the present circumstances, this Court would find that the question whether the Navajo Tribe has retained the inherent sovereign authority to exercise jurisdiction over plaintiffs is a sufficient federal question upon which to base § 1331 jurisdiction.[5]

[4]The Court rejected Plaintiffs' claim under the IRCA, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978), which held that the sole federal remedy for an alleged violation of the Act is application for federal habeas corpus relief under 25 U.S.C. § 1303. Plaintiffs in the present case argue that *Santa Clara* is inapplicable where, as here, the plaintiff is a non-Indian. *See Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). While plaintiffs' argument is not without logic, *Trans-Canada* has taken a different position, and this Court finds *Trans-Canada* controlling.

The *Trans-Canada* Court rejected plaintiffs' assertion of jurisdiction under *Bell v. Hood, supra*, with the following observation: The district court's finding of federal question jurisdiction was based in part upon its assumption that the due process clauses of the fifth and fourteenth amendments were applicable to the Tribe's exercise of its police power over Trans-Canada's proposed construction. Constitutional guarantees, however, are not applicable to the exercise of governmental powers by an Indian tribe except to the extent that they are made explicitly binding by the Constitution or are imposed by Congress. 634 F.2d at 476-477. This Court reads *Trans-Canada* to preclude a finding that the Navajo Tribe has violated plaintiffs' constitutional rights.

[5]The parties have argued a number of other bases of federal jurisdiction. This Court's ruling that § 1331 is appropriate, however, makes consideration of these additional issues unnessary.

While no Circuit Court has expressly ruled on the § 1331 issue, this Court would point to a recent decision by the District Court for the District of New Mexico, *UNC Resources, Inc. v. Kee Joe Benally*, Civ. 80-750 (May 8, 1981), wherein it was determined that the question of "retained tribal sovereignty" was sufficient to find jurisdiction under § 1331.

Sovereign Immunity

Plaintiff Gurley Motors has named the following defendants: the Chairman of the Navajo Tribal Council, the Director of the Division of Public Safety of the Navajo Tribe, three judges of the Navajo Tribal Court, and a judge of the Navajo Court of Appeals. All are sued in their individual as well as their official capacities. Plaintiff Babbitt Ford has taken a slightly different approach. Babbitt has sued the Navajo Indian Tribe, through its Chairman; the Navajo Tribal Court, through its Chief Justice; the Navajo Tribal Police, through the Superintendent; and two non-governmental married couples—the Sellers and the Joes.

All of the above defendants, except the Sellers and the Joes, move to dismiss on the basis of sovereign immunity.

There is no question that Indian tribes enjoy common-law sovereign immunity. *See e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 58, 98 S.Ct. 1670, 1677 (1978). Although the boundaries of this immunity are subject to Congress' plenary control, they cannot be pierced without Congressional authorization, *Santa Clara Pueblo, supra* at 58, 98 S.Ct. at 1677, or tribal consent. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir.), *cert. granted*, U.S. (1980).

Since plaintiffs do not argue waiver, the sole question is whether sovereign immunity bars plaintiffs from suing the Tribe indirectly through its officers.

It has long been settled that a plaintiff cannot avoid the doctrine of sovereign immunity by the simple expedient of naming an officer-defendant rather than the sovereign entity. *See Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457 (1949). In all cases, the "crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." *Id.* at 687, 69 S.Ct. at 1460. Where, as here, the relief sought is an injunction,

> the question is . . . whether by obtaining relief against the officer, relief will not, in effect be obtained against the sovereign. For the sovereign can only act through agents.

Id. at 689, 69 S.Ct. at 1460.

Under the circumstances before this Court, it cannot be seriously argued that an injunction against the officer-defendants would not also work to bar the sovereign. The issue, therefore, is whether plaintiffs can fit their case into a recognized exception to the doctrine of sovereign immunity.

In *Larson v. United States, supra*, the Court discussed two situations in which officers of a sovereign may be restrained from taking an official (as distinguished from a personal) act. *First:* an officer may be restrained when his actions are beyond the sovereign's statutorially imposed limitations. 337 U.S. at 689, 69 S.Ct. at 1461. *Second:* an officer may be restrained when the statute conferring power upon the officer to take action in the sovereign's name is unconstitutional. *Id.* at 690, 69 S.Ct. at 1461. The *Larson* Court emphasized that in both situations, "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Id.* at 690, 69 S.Ct. at 1461-62.

As noted by the Tribe, the problem before this Court does not fit into either of the categories discussed in *Larson*. Neither plaintiff has cited a Navajo statute outside which defendant officers are alleged to have acted. Moreover, although plaintiffs have alleged constitutional violations, the Ninth Circuit has ruled that

> Constitutional guarantees . . . are not applicable to the exercise of governmental powers by an Indian tribe, except to the extent that they are made explicitly binding by the Constitution or are imposed by Congress.

Trans-Canada Enterprises v. Muckleshoot, supra at 476-77.

In essence, the Tribe argues that *Larson's* list of exceptions to sovereign immunity was exhaustive, and that plaintiffs' inability to call upon the *Larson* exceptions is a *per se* bar to plaintiffs' actions.

The flaw in the Tribe's argument is that *Larson* was addressing *federal*, and not tribal, sovereignty. As indicated above, since an officer's act which exceeds the limits of sovereign power cannot be the act of the sovereign, the key to the immunity issue is power. For this reason, *Larson's* list of exceptions would apply to the Tribe only if the boundaries of tribal power and the boundaries of federal power were alike. This is simply not the case. *See generally, Montana v. United States, supra* at 17-20.

Consistent with *Larson*, federal sovereignty is limited only by the Constitution of the United States. Tribal sovereignty, on the other hand, is limited by a number of sources. Tribal sovereignty is limited by those portions of the Constitution that are "explicitly binding," *Trans-Canada v. Muckleshoot, supra* at 476-77; it is limited by Congress' plenary control, *see Santa Clara Pueblo v. Martinez, supra* at 58, 98 S.Ct. at 1677; and it is limited by inconsistent treaty provisions. *See United States v. Wheeler, supra* at 323, 98 S.Ct. at 1086. Finally, tribal sovereignty is limited by the "overriding interests of the National Government." *Washington v. Confederated Tribes, supra* at 2081. *See also, Oliphant v. Suquamish Indian Tribe, supra; Merrion v. Jicarilla Apache Tribe*, 617 F.2d 541.

As this Court stated earlier, the core of plaintiffs' complaints is the extent to which an Indian tribe can assert jurisdiction over non-Indians. It is this exact question that controls the issue of sovereign immunity. If, under the circumstances, the officer-defendant's acts are within the limits of Tribal sovereign power, then plaintiffs' action is barred by sovereign immunity. If the acts are excessive, then plaintiffs will prevail.

Given that the merits of plaintiffs' case and the question of sovereign immunity are hopelessly intertwined, this Court will treat both issues together in its discussion of the merits.

Failure to State a Claim

The merits of this action raise two basic issues: *first*, whether the Navajo Tribe relinquished the power to assert civil jurisdiction over non-Indians when it entered into certain treaties with the federal government, and *second*, if not, whether the Tribe is deprived of that power by any other source.

TREATY PROVISIONS

Plaintiffs argue that even if the Tribe was at one time possessed of the sovereign power to assert civil jurisdiction over non-Indians, it relinquished that right by entering into the Treaties of 1850 and 1868.

The portions of the Treaties emphasized by the parties are as follows:

Treaty of 1850

(Article II) . . . all cases of aggression against said Navajos by citizens or others of the United States . . . shall be referred to the government of said States . . .

(Article III) The Government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajos . . .

(Article VI) Should any citizen of the Unites States . . . maltreat any Navajo Indian . . . he shall be subjected to all the penalties provided by law . . . of the said States.

(Article VIII) The people of the United States of America shall have free and safe passage through the territory . . .

Treaty of 1868

If bad men among the White's or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested

and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, *white*, black, or *Indian*, subject to the authority of the United States and at peace therewith, the Navajo Tribe agree that they will, on proof made to their agent, and on notice by him, *deliver up the wrongdoer* to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

(Emphasis added).

Before analyzing the above provisions, it is important to note certain established principles of treaty interpretation.

Significantly, a tribe is not limited to those powers granted it by treaty. Rather, it retains all aspects of sovereignty that have not been removed by Congress or by the tribe's dependent status. *See United States v. Wheeler, supra* at 323, 98 S.Ct. at 1086. Moreover, the Courts will not acknowledge a Congressional intent to restrict tribal sovereignty unless the intent is "clear." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 60, 72, 98 S.Ct. at 1678, 1684.

In determining what was intended by the parties to a treaty, the language is to be interpreted as it would naturally be understood by the tribe. *See Jones v. Mecham*, 175 U.S. 1, 10-11, 20

S.Ct. 1, 5 (1899). In addition, it is accepted that any doubtful or ambiguous expressions are to be resolved in favor of the Indians. *See McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263 (1973); *Chote v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569 (1912).

Neither plaintiffs nor the Tribe have unearthed any legislative history regarding the treaty provisions at issue. From the language alone, however, and applying the principles set forth above, this Court would reject an interpretation that would divest the Navajo Tribe of the sovereign power to subject non-Indians to its civil jurisdiction.

While there is much in these treaties to suggest that the United States is possessed of criminal, and possibly civil, jurisdiction over reservation incidents, there is nothing that would oust the Tribe from exercising concurrent civil jurisdiction. Both treaties promise that the United States will assist the Indians in righting "wrongs" against the Indians. Neither, however, clearly removes the authority of the Indians to deal with these "wrongs."

Plaintiffs place primary reliance on the "bad men among the Whites" paragraph of the Treaty of 1868, and its promise that once the offender is turned over, the government will "cause the offender to be arrested and punished according to the laws of the United States *and also to reimburse* the injured persons for the loss sustained." (Emphasis added). While this provision contemplates that the injured Indian can seek reimbursement from the *government*, *see Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970), it in no way suggests that the Indians are thereby deprived of the power to seek recovery from the wrongdoer himself. Consistent with the principles of interpretation set forth above, this Court would interpret the "reimbursement" provision to give the Indians an additional avenue for recovery—not to deprive them of anything.[6]

[6]If this Court were to read the "bad men among the Whites" paragraph to oust the Navajos of civil jurisdiction over non-Indians, it would have to give a similar reading to the next paragraph, which covers "bad

INHERENT SOVEREIGNTY

In *Oliphant v. Suquamish Indian Tribe, supra,* the United States Supreme Court rejected the argument that an Indian tribe's inherent sovereignty permits it to assert *criminal* jurisdiction over non-Indians who have violated tribal law. In so doing, the Court looked to previous legislative activity, treaty provisions, and inherent sovereignty itself.

The Court ruled that while Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, "Congress consistently believed this to be the necessary result of its repeated legislative actions." 435 U.S. at 204, 98 S.Ct. at 1019. More importantly,

> *even ignoring the treaty provisions and congressional policy,* Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government . . . But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments.

Id. at 208, 98 S.Ct. at 1021. (Emphasis added). According to the Court, Indian sovereignty is also limited in that tribes cannot exercise powers that are *"inconsistent with their status."* *Id.*, citing *Oliphant v. Schlie,* 544 F.2d at 1007, 1009 (9th Cir. 1976). (Emphasis in original).

Conflicting with the Indians' interest in protecting their own territory, is the federal government's interest in protecting its citizens from "unwarranted intrusions on their personal liberty." 435 U.S. at 209-212, 98 S.Ct. at 1021. Stressing that

men among the Indians." Such an interpretation, however, would fly in the face of *Williams v. Lee,* 358 U.S. 17, 79 S.Ct. 269 (1959), discussed *infra,* which gives the Tribe exclusive jurisdiction over civil actions involving non-Indian plaintiffs and Indian "bad men" and *United States v. Wheeler, supra,* which permits the Indians to subject their own people to criminal prosecution.

upon incorporation into the United States, the "Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate [sovereign] power is constrained so as not to conflict with the interests of this overriding sovereignty", *Id.* at 209, 98 S.Ct. at 1021, the Court ruled that "by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily [gave] up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210, 98 S. Ct. at 1021.

Plaintiffs argue that *Oliphant* demands that the Navajo Tribe be without jurisdiction to enforce its civil law. While this Court would agree that tribal jurisdiction is not equal to that possessed by the States, it would decline to read *Oliphant* for the proposition that non-Indians, especially those who willingly come upon the reservation, cannot be subjected to the tribe's civil authority. *Oliphant* was expressly limited to the question of *criminal* jurisdiction. Neither the relationship between civil and criminal law nor the Supreme Court's decisions in the area of tribal civil jurisdiction compel the conclusion that *Oliphant* should be completely dispositive of the question before this Court.

Oliphant's finding that "unwarranted intrusions on [United State's citizens'] personal property" constituted an overriding national interest would also apply to unwarranted deprivation of property. *See Merrion v. Jicarilla Apache Tribe, supra,* which found a "national, if not a sovereign interest in preventing deprivations of property without due process." 617 F.2d at 542. Unlike a criminal fine, however, which serves to punish the offender, a major purpose of civil law is to *compensate* the victim. Since compensation, unlike punishment, is limited by the amount of damage suffered, *Oliphant's* fears of "unwarranted intrusions" are less justified in civil litigation than in criminal prosecution.

From the Tribe's standpoint, it is also significant that civil compensation works to deter the behavior for which compensa-

tion was ordered. Thus, prohibiting the Tribe from enforcing its civil law would impair the Tribe's ability to protect the health and welfare of its members. *See Montana v. United States, supra* at 19-20.

The practical effect of *Oliphant* in the criminal area was on *who* would punish, not on whether the punishment would occur. In most cases, the non-Indian can be turned over to the appropriate authorities for punishment under the government's laws.

In civil litigation, on the other hand, there is no state or federal system to initiate prosecution. The victim, if he is to be compensated, must do it himself.

The whole basis for our notions of personal jurisdiction is grounded on the principle that the forum where the wrong was committed—where the injury was suffered, is the appropriate place for a plaintiff to sue. Application of *Oliphant* to civil jurisdiction requires the Indian plaintiff to attempt litigation on the defendant's home-base; a forum that might be wholly foreign to the Indian.

In addition to the conceptual differences between civil and criminal actions, the present state of the law does not permit an *Oliphant*-type ruling that Indian tribes are completely without civil jurisdiction over non-Indians. Unlike criminal jurisdiction, the Supreme Court has regularly permitted Indian tribes to assert forms of non-punitive civil jurisdiction over non-Indians. *See e.g., Montana v. United States, supra; Washington v. Confederated Tribes of Colville, supra; Williams v. Lee, supra.*

The most celebrated case in this area is the Supreme Court's 1959 decision of *Williams v. Lee, supra.* In that case, plaintiff, the non-Indian proprietor of a general store on the Navajo Reservation, sued an Indian customer in state court to collect for goods that plaintiff had sold on credit. The Supreme Court held that the *state court* was without jurisdiction to hear the matter and that the *only* forum in which plaintiff could sue was the Navajo Tribal Court.

Although *Williams v. Lee* involved a non-Indian plaintiff, and is therefore not directly on-point, the case establishes some highly-significant principles.

At a minimum, the case establishes that, where plaintiff is a non-Indian, and where "to allow the exercise of state jurisdiction . . . would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," *Id.* at 223, 79 S.Ct. at 272, Indian tribes have retained the sovereign authority to assert jurisdiction over non-Indians. But the case goes further than this. Under the above facts, the sovereign authority of the Tribe is so great that it can actually usurp the sovereign authority of a state of the United States.

In this case, the Tribe is not attempting to prevent the State from exercising jurisdiction. It is merely asking that its jurisdiction be concurrent. Simply stated, the central issue in this case is whether the Tribe's sovereign power, recognized in *Williams v. Lee*, applies when plaintiff is an Indian who wishes to proceed in Tribal Court.

Plaintiffs' primary argument is that *Williams v. Lee* was based on a consent theory. As in *Oliphant v. Suquamish*, the non-Indian defendant in this case is being dragged unwillingly into a foreign forum which may or may not accord him the rights to which he would be entitled in a court of the United States.

The difficulty with plaintiffs' argument is that subsequent Supreme Court decisions have not completely limited the rationale of *Williams v. Lee* to cases in which the plaintiff was a non-Indian. While it has never ruled on the exact question before this Court, the Supreme Court has analyzed the problem in the areas of taxation and hunting regulation.

In *Washington v. Confederated Tribes of Colville Indian Reservation, supra*, the question concerned the Tribe's power to extract a tax from a non-Indian purchaser of cigarettes. The Court rejected the argument that the Tribe was without such power:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or *necessary implication of their dependent status.*

Id. at 2080-81. (Emphasis added).

The Court noted that both the executive branch and the federal courts have consistently recognized tribal power to tax non-Indians entering the reservation to engage in economic activities. Moreover, the Court stated that in cases where the tribe has a significant interest in the subject matter, this power

> was very probably one of the tribal powers under 'existing law' confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476. In these respects the present cases differ sharply from *Oliphant v. Suquamish Indian Tribe* . . . , in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians.

Id. at 2081.

The Court went on to make the following significant observations:

> Tribal powers are not implicitly divested by virtue of the Tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the *overriding interests of the National Government,* as when the Tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or *prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights* . . . In the present case, we can see no overriding federal interest that would necessarily be frustrated by the tribal taxation. And even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that *tribal sovereignty is dependent on and subordinate to only the Federal Government, not the States.*

Id.[7]

In *United States v. Montana*, 604 F2d 1162 (9th Cir. 1979), the Ninth Circuit established that a Tribe's civil authority over non-Indians extended to the power to regulate hunting and fishing on the reservation. Quoting its prior ruling in *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976), the Court held that the Tribe retained the

> rights to determine who may enter the reservation to hunt or fish; to define the conditions upon which they may enter; to prescribe rules of conduct, to expel those who enter the reservation without proper authority or those who violate tribal, state or federal laws; to refer those who violate state or federal laws to state or federal officials; and to designate officials responsible for effectuating the foregoing.

[7]Also involving the sovereign taxing authority is the Tenth Circuit's decision of *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), which has been recently argued before the Supreme Court. In that case, the Court of Appeals upheld the right of the Apache Tribe to tax non-Indian lessees who produced oil and gas from within the reservation.

The *Merrion* Court distinguished *Oliphant v. Suquamish*, *supra*, by aligning it with those cases in which the Supreme Court had found the Indians' exercise of sovereign power to be "inconsistent with the superior interests of the United States as a sovereign nation." 617 F.2d at 541. *Oliphant's* ruling that Indians were without power to exercise criminal jurisdiction over non-Indians was seen to rest on the conclusion that

> the power of the tribes to restrict the personal liberty of United States citizens conflicts with the federal government's overriding interest in protecting its citizens 'from unwarranted intrusions on their personal liberty.' *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210, 98 S.Ct. 1011, 1021, 55 L.Ed.2d 209.

Id. at 541.

Although the *Merrion* Court did find a "national, if not sovereign interest in preventing deprivations of property without due process . . .," it also found that "in the context of taxing, [due process] is implicated only in the extremely rare case . . . " *Id.* at 542.

The Court rejected the notion that *United States v. Wheeler*, *supra*, and *Oliphant v. Suquamish*, *supra*, stand for the proposition that "Indians are without inherent powers over any nonmembers of their tribe." *Id.* Instead, citing such decisions as *Williams v. Lee*, *supra*, the Court was persuaded by "Supreme Court decisions to the effect that the tribe's retained powers have at least some elements of territoriality." *Id.*

604 F.2d at 1170.

Montana also involved the degree to which the Tribe could regulate hunting and fishing on fee-patent lands, located within the boundaries of the Reservation, which had been sold by Indians to non-Indians. With respect to this issue, the Ninth Circuit held that although the Tribe could not prohibit non-Indians from hunting in these areas, it could engage in regulation which was "reasonable, nondiscriminatory, and consistent with sound principles of conversation." *Id.* at 1172.

The Supreme Court granted certiorari and summarily affirmed the Ninth Circuit's conclusion as to the power of Indians to regulate non-Indians *on the reservation. See Montana v. United States,* U.S. , Slip Opinion at 11 (March 24, 1981). It reversed, however, as to the power to control activity on fee-patent lands. In so doing, the Court made the following observations as to the power of Indians to assert civil jurisdiction over non-Indians on the reservation:

The Court emphasized that while tribes have retained the sovereign power to regulate their own affairs, the

> exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation.

Slip Opinion at 18. According to the Court, it was this principle which was applied to *Oliphant:*

> Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the *general* proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. *To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations,* even on non-Indian lands. A tribe may regulate, through taxations, licensing, *or other means,* the activities of nonmembers who enter *consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other*

> *arrangements* . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.*

Id. at 19-20. (Emphasis added).

The above-referenced cases lead this Court to conclude that the rule of *Williams v. Lee* is not limited to situations in which the non-Indian is a plaintiff. They also suggest, however, that the ability of a tribe to exercise civil jurisdiction over non-Indian defendants has two limitations.

First: Montana v. United States, supra, appears to impose the requirement that the dispute arise out of a "consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or that the conduct of the non-Indian defendant "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." Slip Opinion at 19-20. Such a limitation requires more in the way of minimum contracts than would be sufficient for the citizen of one state to assert personal jurisdiction over the citizen of another state. *See e.g. Worldwide Volkswagen,* U.S. , 100 S.Ct. 559 (1980).[8]

Second: several Supreme Court decisions have required that any assertion of jurisdiction by an Indian tribe be examined to determine whether it would be "inconsistent with the overriding interests of the National Government." *Washington v. Confederated Tribes of Colville, supra* at 2081. *See also Montana v. United States, supra; Oliphant v. Suquamish, supra.*

This Court has little difficulty in holding that the first part of the above text is met. At least where the dealer is aware of

[8]This limitation, for example, would distinguish Judge Bratton's recent decision in *UNC Resources, Inc. v. Benally,* Civ 80-750 (May 8, 1981), wherein the Court took the position that the Navajo Tribe could not assert civil jurisdiction over a defendant who's operations outside the reservation inadvertently caused contamination of reservation water.

his customer's residence at the time of the sale (and it would be hard to imagine a credit sale where this is not the case), there is a "consentual relationship with the tribe or its members." This is no less the case with the dealer's decision, upon default, to go onto the reservation to repossess the offending vehicle.

In addition to the consentual nature of plaintiffs' relationship with the Tribe, it is also apparent that unlawful repossession "threatens or has some effect on the political integrity, the economic security or the health or welfare of the tribe." *Montana, supra* at 19-20. The Tribe has a real interst in discouraging self-help repossessions. Not only does § 607 *et seq.* reduce the possibility that Indians will be wrongfully deprived of their property, it was enacted for the express purpose of preventing "breach of the peace." *See* § 609.

The real question in this case is whether the Tribe's assertion of civil jurisdiction, under these circumstances, is "inconsistent with the overriding interests of the National Government."

As previously indicated, *Oliphant's* conclusions as to the assertion of criminal jurisdiction were prompted by a desire to protect United States' citizens from "unwarranted intrusions on their personal liberty." 435 U.S. at 210, 98 S.Ct. at 1021. As also noted, "unwarranted" intrusions are more likely when the purpose is to punish than when the purpose is to compensate.

For these reasons, the Court would distinguish between assertions of civil jurisdiction which are punitive and those which attempt to make the victim whole. The Court would hold that insofar as they are compensatory, tribal assertions of civil jurisdiction over non-Indians do not conflict with an overriding national interest. Attempts to punish, however, are prohibited.

The Court will not turn to the ordinances at issue to determine whether they fall within the above guidelines.

Nature of Statutes Involved

Sections 608 and 609 set forth three penalties for non-Indians who violate § 607's repossession procedure. Section 608(a) permits the Tribe to exclude violators from land subject to the jurisdiction of the Navajo Tribe; section 608(b) permits the Tribe to deny violators the privilege of doing business on the reservation; and section 609 permits an Indian from whom consumer goods were repossessed to sue the violator in Tribal Court for damages. In the event § 609 is applicable, the injured party can recover

> in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the case price.

While the parties discuss all three of the above provisions, their complaints are sufficient only as to § 609, the civil liability section.[9] As previously stated, Gurley alleges that § 609

[9]In response to Babbitt's motion for preliminary injunction, the Sellers and the Joes allege that on March 24, 1980, Babbitt was denied the privilege of doing business on the Reservation and permanently excluded therefrom (with the exception that Babbitt is still authorized to seek relief or defend claims in Tribal Court and can still travel state or federal highways for purposes other than doing business.)

Since Babbitt has neither raised these facts, nor contested the Tribe's ability to exclude, it is not necessary for the Court to discuss this aspect of Tribal power. It is sufficient to note that the Ninth Circuit has recognized the power of the Navajo Tribe to exclude persons from the Reservation for infractions of Tribal law. *See Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976).

While Gurley has not actually been banned from the Reservation, it argues that if the exclusion provisions were applied to prevent auto dealers from repossessing, such action would constitute a "forfeiture" within the meaning of *Quechan v. Rowe, supra*. The problem with Gurley's argument is that even if Gurley stood in imminent danger of having the exclusion provision applied to it, there is no reason to believe that the provision would be applied so as to prevent repossessions that complied with § 607. Gurley's argument is simply premature. *See e.g. O'Shea v. Littleton*, 414 U.S. at 494, 94 S.Ct. at 675.

suits against it are imminent; Babbitt alleges that they have actually occurred. On November 28, 1979, Tom and Lorraine Sellers obtained a judgment against Babbitt for $476.65. On March 24, 1980, Barney and Alice Joe obtained a judgment for $4,446.75. In each case, Babbitt admits that it failed to follow the repossession procedure of § 607.

Given that the issue is compensation, the liquidated damages provision of § 609, quoted above, is especially significant. This provision allows the Indian to recover the specified amount regardless of whether he proves damages. All he must do is prove that § 607 has been violated.

Liquidated damage provisions are not *per se* penal. It is widely recognized that they "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable . . . " *Rex Trailer Co. v. United States*, 350 U.S. 148, 153, 76 S.Ct. 219, 222 (1956). *See also, Brady v. Daley*, 175 U.S. 148, 20 S.Ct. 62 (1899). Liquidated damage provisions become penal only when, compared to the wrong to which they are directed, they are overly-generous. *Cf. In re Plywood Co. of Pennsylvania*, 425 F.2d 151, 155 (3d Cir. 1970).

Moreover, the validity of the provision in any given case is not determined with respect to the damages at hand; it is determined with respect to the reasonableness of the forecast. *Id.*

The Court's primary objection to the liquidated damages provision of § 607 is that it applies identically to both justified and unjustified repossessions.

When repossession is unjustified by the parties' contract and the law applicable thereto, the nature and quantity of the Indian's loss is sufficient to sustain the ordinance. In this situation, it is presumable that the Tribal Court would have refused to permit the repossession. Therefore, as a direct consequence of the dealer's failure to comply with § 607, the Indian has been deprived of his property—a vehicle to which he was right-

fully entitled. In light of the seriousness of the trespass and the difficulty in ascertaining its consequences, this Court cannot say that the damages provision of § 609 is penal. Rather, it is an attempt to compensate the Indian for a substantial loss. In accordance with the principles previously discussed, this is within the Tribe's lawful jurisdiction.

The problem arises when § 609 is applied to substantively justified repossessions–repossessions that would have been authorized had the dealer complied with § 607. In those instances, the only right of which the Indian is deprived is the right not to have his vehicle repossessed until the dealer has complied with Rule § 607. Since the Indian has no substantive right to the vehicle, his loss under these circumstances is considerably less than if he had not in fact defaulted.

While the procedural right emboided in § 607 is worth something, the liquidated damages provision of § 609 overestimates its value. In most cases, application of § 609 is justified repossessions would operate as a windfall to the defaulting Indian. Although the ordinance is also useful to persuade car dealers that compliance with § 607 is the best policy, *Oliphant* does not permit the Court to recognize its deterrence value.

The Court is not saying that a defaulting Indian could never prove losses equal to § 609's liquidated damages. It is not difficult to imagine circumstances where, despite technical default, the equities would remain with the Indian.[10] The point is, in many cases involving substantively justified repossession, § 609 would overcompensate. For this reason, the liquidated damages provision cannot be tolerated. It exceeds the Tribe's lawful authority.

SUMMARY AND CONCLUSION

For years the courts have been struggling to define the boundaries of Indian sovereignty. Today, with the increased

[10]For example, a dealer might tolerate late payment all along and then repossess as the contract nears completion.

presence of non-Indians in Indian territory, the issue of tribal jurisdiction has become especially important.

It is without question that Indian sovereignty extends beyond the Tribe's ability to govern its own people. In order to assure the Tribe' political and economic integrity, and to protect the health, safety and welfare of its members, it is necessary for a tribe to exercise a degree of territorial jurisdiction.

In the past, the courts have affirmed the Tribes' power to tax non-members, *Washington v. Confederated Tribes of Colville, supra,* and to prescribe the conditions upon which non-members may enter the reservation. *United States v. Montana, supra.* Most significantly, under the appropriate circumstances, Indian sovereignty can preclude a non-Indian plaintiff from suing an Indian in any court but the Tribe's own. *Williams v. Lee, supra.*

This Court would extend the Tribes' territorial sovereignty to enable it to assert civil jurisdiction over non-Indian defendants. As previously stated, however, it would limit the Tribe's power to those cases which

(1) arise out of a consentual relationship with the Tribe or its members or threaten or have some direct effect on the political integrity, the economic security or the health or welfare of the Tribe, and

(2) are not inconsistent with an overriding national interest.

In keeping with the second requirement, this Court would hold that, in awarding civil judgments against non-Indians, the Tribe cannot do more than reasonably compensate its plaintiff. Given the "unwarranted" intrusions that are possible with punishment, *see Oliphant v. Suquamish, supra,* the United States retains an "overriding national interest" in maintaining exclusive penal jurisdiction. If the Indians want to punish outsiders, either physically or financially, they can turn to the courts of the United States.

This Court concludes that the Navajo Tribe has the jurisdiction to enforce the minimum damage provision of § 609, but

only as to repossessions that were not justified by the parties' contract and the law applicable thereto. As to repossessions that were substantively justified, the Indian must prove his damages. Damages in excess of that which reasonably compensates the plaintiff for his losses are not permissible. Both Babbitt and Gurley are entitled to a declaratory judgment and an injunction to this effect.

As to the individual cases presented in the Babbitt complaint, this Court is of the opinion that said cases should be retried in the Tribal Court of the Navajo Tribe in accordance with the principles announced herein.

Therefore,

IT IS ORDERED that plaintiffs submit a form of judgment, reflecting the foregoing opinion in compliance with Rule 54(b), Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that each party bear its own costs.

DATED this day of July, 1981.

C. A. Muecke, Chief Judge

APPENDIX "C"

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-686 PCT CAM

BABBITT FORD, INC., an Arizona corporation,
Plaintiff,

vs.

THE NAVAJO INDIAN TRIBE, through its Chairman, Peter MacDonald, et al.,
Defendants,

No. CIV 80-925 PHX CAM

GURLEY MOTOR COMPANY,
a New Mexico corporation,
Plaintiff,

vs.

PETER MacDONALD, individually and in his official capacity as Chairman of the Navajo Tribal Council, et al.,
Defendants.

JUDGMENT

Upon consideration of plaintiffs' complaints seeking declaratory and injunctive relief and evidence introduced in support thereof, and upon consideration of defendants' motions to dismiss and plaintiff Babbitt Ford's motion for preliminary injunction and memoranda in support of said motions and responses and replies thereto, and upon consideration of oral argument in support of and in opposition to said motions, and in accordance with this Court's Opinion of July 14, 1981, and for the reasons stated therein, it is hereby

ORDERED, ADJUDGED AND DECREED THAT

1. This dispute presents a justifiable case or controversy ripe for adjudication under Article III of the Constitution of the United States.

2. The question of whether the Navajo Tribe has retained the inherent sovereign authority to exercise jurisdiction over plaintiffs is a sufficient federal question under Federal common law upon which to base 28 U.S.C. § 1331 jurisdiction.

3. The Navajo Tribe and its officers enjoy sovereign immunity from suit except that tribal officers can be enjoined from performing acts which exceed the limits of Tribal sovereign power.

4. The Navajo Tribe's inherent sovereign power to subject non-Indians to its civil jurisdiction has not been divested by either the Navajo Treaties of 1850 and 1868 or by reason of the Tribe's dependent status; wherefore plaintiffs' claims in that regard are dismissed for failure to state a claim upon which relief can be granted.

5. The statutory damage provision of 7 N.T.C. § 609 is a valid exercise of inherent Navajo sovereignty over non-Indians where the repossession is unjustified by the parties' contract and the law applicable thereto. As to non-Indians repossessions which are substantively justified by the parties' contract and applicable law thereto, the exercise of inherent Navajo sovereignty embodied in § 609 is inconsistent with the overriding

interests of the National Government since it awards damages in excess of the damage actually suffered by the individual Indians and, therefore, punishes non-Indians. Tribal punishment of non-Indians for the non-Indians' acts on Tribal land is beyond the limits of tribal sovereign power; wherefore defendants Navajo Tribe, Homer Bluehouse, Harry D. Brown, Robert D. Walters and Nelson J. McCabe are hereby enjoined from awarding statutory damages under 7 N.T.C. § 609 against non-Indians or allowing to be enforced those portions of the judgments against Babbitt Ford in favor of Barney and Alice Joe (Case No. TC-CV-161-79; date of judgment March 24, 1980) and in favor of Tom and Lorraine Sellers (Case No. TC-CV-160-79, date of judgment November 28, 1979) which award money damages. This injunction is to remain in effect until such time as those cases have been reviewed, with notice and an opportunity to be heard given to Babbitt Ford, and the proper amount of these damages awards, if any, has been computed. The Navajo Tribe has the jurisdiction to enforce provisions of 7 N.T.C. § 609, including the provisions thereof regarding minimum damages against non-Indians, which reasonably compensate the plaintiff for his losses, if any, but only as to repossessions that were not justified by the parties' contract or the law applicable thereto.

6. The suits between plaintiff Babbitt Ford, Incorporated, and Tom and Lorriane Sellers, and Joe and Alice Joe are hereby removed to the Tribal Court of the Navajo Tribe to be retried in accordance with this Order.

7. Defendants are enjoined from retaining any property belonging to Babbitt Ford which is now held pursuant to the Tribal Court judgments, unless there exists a valid claim against said property in accordance with the terms of the judgment.

8. The defendants' Motions to Dismiss are denied.

9. Each party shall bear its own costs.

DATED this 19th day of November, 1981.

C. A. Muecke, Chief Judge

APPENDIX "D"

JUDGMENT ENTRY OF THE NINTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-6054
No. 82-5002
No. 81-6052

CV 80-686; 80-925

BABBITT FORD, INC., an Arizona corporation,
Plaintiff-Appellant,

v.

NAVAJO INDIAN TRIBE, through its Chairman,
Peter MacDonald, et al.,
Defendants-Appellees,

and

TOM and LORRAINE SELLERS,
Defendants-Cross-Appellants.

GURLEY MOTOR CO., a New Mexico corporation,
Plaintiff-Appellant,

v.

PETER MacDONALD, et al.,
Defendants-Appelles.

APPEAL from the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part and reversed in part.

Filed and entered July 15, 1983

Phillip B. Winberry,
Deputy Clerk of the Court

APPENDIX "E"

CERTIFIED COPY OF THE JUDGMENT
OF THE COURT OF APPEALS
IN LIEU OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-6054
No. 82-5002
No. 81-6052

CV 80-686; 80-925

BABBITT FORD, INC., an Arizona corporation,
Plaintiff-Appellant,

v.

NAVAJO INDIAN TRIBE, through its Chairman,
Peter MacDonald, et al.,
Defendants-Appelles,

and

TOM and LORRAINE SELLERS,
Defendants-Cross-Appellants.

GURLEY MOTOR CO., a New Mexico corporation,
Plaintiff-Appellant,

v.

PETER MacDONALD, et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part and reversed in part.

Filed and entered August 9, 1983.

Phillip B. Winberry,
Deputy Clerk of the Court

APPENDIX "F"

1850 TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO INDIAN TRIBE
9 Stat. 974

PART 1. TREATIES

Treaty of 1850

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS

(Ratified by the Senate September 9, 1850;
Proclaimed by the President September 24, 1850)

(9 Stat. 974)

The following acknowledgements, declarations, and stipulations have been duly considered, and are now solemnly adopted and proclaimed by the undersigned: that is to say, John M. Washington, Governor of New Mexico, and Lieutenant-Colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fe, in New Mexico, representing the United States of America, and Mariano Martinez, head chief, and Chapitone, second chief, on the part of the Navajo tribe of Indians:

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N.P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said

United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

II. That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States: that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, shall be referred to the Government of said States for adjustment and settlement.

III. The Government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the Government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the Government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fe, New Mexico, as soon as he or they can be

apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

VI. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indians or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the Government of the United States of America will establish such military posts and agencies, and authorize such trading houses, at such time and in such places as the said Government may designate.

IX. Relying confidently upon the justice and the liberality of the aforesaid Government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the Government of the United States shall, at its earliest convenience, designate, settle,

and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

X. For and in consideration of the faithful performance of all the stipulations herein contained by the said Navajo Indians, the Government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said Government may deem meet and proper.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the Government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J.M. Washington, [L.S.]
Brevet Lieutenant-Colonel Commanding.

James S. Calhoun, [L.S.]
Indian Agent, residing at Santa Fe

Mariano Martinez, his x mark [L.S.]
Head Chief,

Chapitone, his x mark [L.S.]
Second Chief,

J.L. Collins

James Conklin

Lorenzo Force

Antonio Sandoval, his x mark
Francisco Josto, his x mark
Governor of Jemez.

Witnesses–

H.L. Kendrick, *Brevet Major, U.S.A.*
J.N. Ward, *Brevet 1st Lieut. 3d Inf'ry.*
John Peck, *Brevet Major U.S.A.*
J.F. Hammond, *Assistant Surg'n U.S.A.*
H. L. Dodge, *Capt. comd'g Eut. Rg's.*
Richard H. Kern
J.H. Nones, *Second Lieut. 2d Artillery.*
Cyrus Choice.
John H. Dickerson, *Second Lieut. 1st Art.*
W.E. Love
John G. Jones
J. H. Simpson, *First Lieut. Corps Top. Engrs.*

APPENDIX "G"

PROCEEDINGS OF THE 1850 NAVAJO TREATY COUNCIL NEGOTIATIONS: EXCERPTS

SENATE EXECUTIVE DOCUMENTS, VOL. 14, SER. 562

S. Exec. Doc. No. 64, 31st. Cong., 1st. Sess (1850) constitutes a report of the executive department of the government to the Congress on reconnaissances of routes into the Southwestern territories and of an expedition into Navajo Country. The journal of Lt. Simpson's Navajo Expedition includes proceedings between the Navajo Chiefs and American representatives of the executive department which culminated in the Treaty of 1850 executed at Canyon de Chelly. The Report states

> Several Navajo men and women were yesterday afternoon and this morning in our last camp. They said the troops had come over sooner than they had expected; that their people were yet living on their cornfields nearby; and that they had collected some 15 horses and mules and a number of sheep, to deliver up, according to the requirements which the colonel commanding had made of them, through Brevet Major Brier, some weeks previous, at Jemez; that they would conform to the treaty which Col. Nuby had made with them; did not want to fight . . . p. 88.
>
> This afternoon, several of the head-men of the Navajo tribe have been in camp, and had a talk with Col. Washington and the Indian Agent, Mr. Calhoun—the object of these gentlemen being to inform them that the troops were there in accordance with the terminations made known to them some weeks since at Jemez; that if they did not comply with the treaty made with them by Col. Nuby, which required that they should give up all Mexican captives, all murderers of Mexicans who had secreted themselves among them, and all Mexican stock they had driven off since the establishment of the government of the United States

over them, the United States would send among them a body of troops to enforce it. The result of the conference was that the chiefs present promised to send word out to all the other chiefs, who, they said, would be in camp tomorrow at noon, to hold a council with the United States and have matters settled. p. 89.

To-day about noon, at our last camp, three Navajo Chiefs appeared in council—Narbona, Jose Largo, and Archuleta—when . . . the following colloquy took place, the interpreter Mr. onkling, of Santa Fe, delivering the several points seriatim, as they were expressed by Col. Washington and Mr. Calhoun? p. 89.

Col. Washington: "Tell them [the Navajo] that I wish them to go the Chelly, so that a treaty may be made with the whole nation. Tell them that the treaty I wish to make with them is to establish the conditions they promised yesterday to comply with. Tell them the treaty I proposed to make with them will be based upon the demands I have already made; and the object, in addition, will be a permanent peace. pp. 89-90.

Mr. Calhoun: Tell them they are lawfully in the jurisdiction of the United States and they must respect that jurisdiction. p. 90.

Interpreter: They say they understand it. p. 90.

Mr. Calhoun: Tell them that, after the treaty is made their friends will be the friends of the United States, and their enemies, the enemies of the United States.

Tell them, when any difficulty occurs between them and any other nation by appealing to the United States they may get redress.

Are they willing to be at peace with all the friends of the United States? p. 90.

Interpreter: They say they are willing. p. 90.

Mr. Calhoun: Tell them that, by the treaty which it is proposed to make with them, all trade between themselves and other nations will be recognized as under regulations to be prescribed by the United States. p. 90.

Col. Washington: And the object of this is to prevent their being imposed upon by local bad men. p. 90.

Interpreter: They understand it, and are content. p. 90.

Mr. Calhoun: Tell them, if any wrong is done them by a citizen of the United States, or by a Mexican, he or they shall be punished by the United States as if the wrong had been done by a citizen of the United States, and on a citizen of the United States. p. 90.

Interpreter: They say they understand it, and it is all right. p. 90.

Mr. Calhoun: That the people of the United States shall go in and out of their country without molestation, under such regulations as shall be prescribed by the United States. p. 90.

Interpreter: They say, very well. p. 90.

Mr. Calhoun: Tell them that, by this treaty, the government of the United States are to be recognized as having the right to establish military posts in their country wherever they may think it necessary in order to the protection of them

and their rights. That the government of the United States claim the right to have their boundaries fixed and marked, so as to prevent any misunderstanding on this point between them and their nabours. p. 90.

Interpreter: They say they are very glad. p. 90.

Mr. Calhoun: For and in consideration of all this, and a faithful performance of the treaty the government of the United States will, from time to time, make them presents, such as axes, hoes, and other farming utensils; blankets, etc. p. 90.

Interpreter: They say it is all right. p. 90.

The several points of the proposed treaty having been explained to the chiefs to their satisfaction, Narbona, the head chief, and Jose Largo, both very aged—the former about 80, and the latter about 70—voluntarily signed powers of attorney, by which full authority was granted to Armijo and Pedro Jose, two younger chiefs, to act for them at Chelly in the proposed council, in the same manner and to the same extent as they would do were they present. p. 90.

The council breaking up, Sandoval harangued some 200 or 300 Navajoes ranged before him on horseback—the object, as it occurred to me, being to explain to them the views and purposes of the government of the United States. Sandoval himself [was] habited in his gorgeously-colored dress, and all the Navajos as gorgeously decked in red, blue, and white . . . p. 90.

The Report nevertheless notes that "the governor of New Mexico, some years since, attempted to make his way into the Navajo country through the pass we have been threading, and was driven back." p. 96. The Report them recounts the proceedings which occurred at Canyon de Chelly immediately before the signing of the 1850 Treaty:

This A.M., a couple of Navajoes—one of them a chief—were brought into camp by Sandoval, both of them embracing Col. Washington and Mr. Calhoun, apparently, with a great deal of good will. The chief, whose name is Mariano Martinez—habited as he was in a sky-blue blanket greatcoat, apparently of American manufacture and not unlike my own; a tarpaulin hat, of rather narrow brim, and semi-spherical crown; buckskin leggins and moccasins; bow and quiver slung about him; a pouch and knife at his side; and possessing a somber cast of countenance, which seemed to indicate energy and perseverance combined—appeared like a man who had naturally risen up by virtue of the energy of his character, and from the effects of a maurauding life upon a civilized community, had become impressed with the jacobin look which he at the time discovered. The conversation which passed between the chiefs and the colonel commanding was as follows:

Col. Washington: Who is this Man (referring to Martinez)?

Interpreter: He is the principal Chief of the Navajoes.

Col. Washington: Tell him, when a chief wishes to talk with me, by making known his intentions by a white flag, he will be conducted safely into camp; but that everybody else must keep a mile off, or else liable to be shot. Are he and his people desirous of peace? p. 101.

Interpreter: He says they are. p. 101.

Col. Washington: Tell them, if they are, they can easily obtain it by complying with the terms of the treaty, which they have made and that the sooner they do comply with them the better it will be for them, as less of their property will be wasted and destroyed. p. 101.

Interpreter: His reply is that they will bring in all they have stolen, and comply with the treaty.

Col. Washington: Mr. Collins, where is the list of the property to be restored under the treaty? p. 101.

Mr. Collins: Here it is, sir. p.101.

Col. Washington: Add to it that which has been stolen from us on the march. p. 101.

Mr. Collins: Here it is, sire, with the additions made. p. 101.

Col. Washington: Tell the chief the stolen property which the nation is required to restore is: 1,070 head of sheep, 34 head of mules, 19 head of horses and 78 head of cattle. p. 101.

Interpreter: The cattle, the Chief says, he knows nothing about; the Apaches must have stolen *them.* p. 101.

Col. Washington: Tell him that if this should afterwards prove to be true, the cattle will be paid for. p. 102.

Interpreter: He says, if he cannot bring in the same cattle, he will bring in others to supply their places. p. 102.

Col. Washington: When can the Chiefs collect here to make a treaty with me? p. 102.

Interpreter: He says the day after tomorrow. p. 102.

Col. Washington: Tell him that will do; and that, when the treaty is made with them, all the property the troops

have taken, they will be compensated for. And there was one more thing he would say: that, if they now entered into a treaty with him in good faith, it would result in blessings upon him and his people; but if they did not, it would result in their destruction. p. 102.

Interpreter: The Chief replies that his people will do all he has promised. p. 102.

Col. Washington: Tell him the talk is good. p. 102.

The conference ended, the Chief and his attendant, a la mode Mexicaine, again embraced Col. Washington and Mr. Calhoun very impressively and apparently with much endearment. p. 107.

The parties there [at Canyon de Chelly] there entered into a treaty, by which the government of the United States assumed the paternal control it has been in the habit of exercising over the tribe of Indians within or bordering upon its domain; and the Navajo nation, on its part, through its head chiefs, Martinez and Chapaton, who represented that what they did was binding on the whole nation, gave their full and unequivocal assent to all its terms. Particular care was taken both by the colonel commanding and the Indian Commission to make the Chiefs comprehend the full import of the treaty to which they were invited to give their assent. And, to be certain that all was done that could be done to insure this, each and every officer present was appealed to know whether he considered the treaty had been sufficiently explained; to which they all, without exception, responded in the affirmative. p. 107.

A full and complete treaty has been made with the Navajoes, by which they have put themselves under the jurisdiction and control of the government of the United

States, in the same manner and to the same extent as the tribes bordering the United States. p. 107.

It is true the Navajos may fail to comply with the terms of the treaty. But, whether they comply or not, the fact still remains the same, that a treaty, *covering the whole ground*, as well as in the general as in the particular, was necessary, in order to satisfy the public mind, as well as [to] testify to the whole world that, should any future coercion become necessary, it would be but a just retribution, and, in a manner, their own act. p. 107.

After the treaty was signed, 100 Navajoes came to trade with the troops, seemingly happy that so peaceful a termination had been given to the affairs. p. 108.

Martinez, the principal Navajo Chief, brought in a beautiful mule this A.M. to present to the col commander. The col., however, with the remark that it was neither customary nor proper on the part of public officers to receive such presents, graciously declined it. p. 108.

Two Navajoes came into camp this afternoon and delivered up a captive Mexican boy. They represented they are from Chusca, and that their people are collecting the stolen property for the purpose of surrendering it, agreeably to treaty. p. 116.

Just before reaching Zuni, we passed the dead body of an Indian lying perfectly exposed upon the ground. We afterwards learned from the governor of the pueblo that the body was that of a Navajo prisoner, whom they had killed five days since, by direction of a California emigrant. Competent authority, surely." pp. 116-117.

Sad news has reached us to-night. The mail from the States, for which we all have been looking with so much anxiety, is reported to have been cut off by the Navajos, on its way out to us, at Chelly. This is a serious disappointment to us all. p. 133.

APPENDIX "H"

1868 TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO INDIAN TRIBE
15 Stat. 667

Treaty of 1868

Treaty between the United States of America
and the Navajo Tribe of Indians;
Concluded June 1, 1868; Ratification advised July 25, 1868;
Proclaimed August 12, 1868 (15 Stat. 667)

ANDREW JOHNSON,
President of the United States of America

To all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded at Fort Sumner, in the territory of New Mexico, on the first day of June, in the year of our Lord, one thousand eight hundred and sixty-eight, by and between Lieutenant-General W.T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States and Barboncito Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

ARTICLES of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W.T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo Nation or tribe of Indians, represented by their chiefs and head-men, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass

through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30' west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter-shop and blacksmith-shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken

in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land-book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Landbook."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian—each Indian being encouraged

to manufacture their own clothing, blankets, etc.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2d. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home or travelling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head-man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any

individual member of the tribe of his rights to any tract of land selected by him as provided in article [5] of this treaty.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any condition provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2d. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3d. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the Tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe

make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W.T. Sherman,
Lt. Gen'l, Indian Peace Commissioner
S.F. Tappan
Indian Peace Commissioner

Barboncito, *Chief*	his x mark
Armijo	his x mark
Delgado	his x mark
Manuelito	his x mark
Largo	his x mark
Herrero	his x mark
Chiqueto	his x mark
Muerto de Hombre	his x mark
Hombro	his x mark
Narbono	his x mark
Narbono Segundo	his x mark
Ganado Mucho	his x mark

COUNCIL:

Riquo	his x mark
Juan Martin	his x mark
Serginto	his x mark
Grande	his x mark
Inoetenito	his x mark
Muchachos Mucho	his x mark
Chiqueto Segundo	his x mark
Cabello Amarillo	his x mark
Francisco	his x mark
Torivio	his x mark
Desdendado	his x mark
Juan	his x mark
Guero	his x mark
Gugadore	his x mark
Cabason	his x mark
Barbon Segundo	his x mark
Cabares Colorados	his x mark

Attest:

Geo. W.G. Getty
Col. 37th Inf'y, Bt. Maj. Gen'l USA
B.S. Roberts
Bt. Brg. Gen'l USA, Lt. Col. 3d. Cav'y
J. Cooper McKee
Bt. Lt. Col. Surgeon USA
Theo H. Dodd
U.S. Indian Ag't for Navajos
Chas. McClure
Bt. Maj. and C.S.U.S.A.
James F. Weeds
Bt. Maj. and Asst. Surg. USA
J.C. Sutherland
Interpreter
William Vaux
Chaplain, USA

APPENDIX "I"

PROCEEDINGS OF THE 1868 NAVAJO TREATY COUNCIL NEGOTIATIONS

The proceedings of the negotiation and execution of the 1868 Treaty between the United States of America and the Navajo Indian Tribe have never been published. They exist in manuscript form in the National Archieves File, Treaty No. 372, Document No. 2. The following is a typescript of the handwritten transcript of these Treaty Proceedings which was submitted to the Ninth Circuit Court of Appeals in this case.

PROCEEDINGS OF COUNCIL WITH THE NAVAJO INDIANS
1st. Day, May 28, 1868

Proceedings of a Council between General *W. T. Sherman* and *Samuel F. Tappan* Commissioners on the part of the United States, and the Chiefs and Head men of the Navajo tribe of Indians held at the Reservation known as the Bosque Redondo at Fort Sumner in the Territory of New Mexico, on the 28th day of May 1868.

Indian Chiefs Present

Delgadito
Barboncito
Manuelito
Sargo
Herrero
Armijo
Torivo

Jesus Alviso Indian Interpreter, and *James Sutherland* Spanish Interpreter

General *Sherman*, said:

The Commissioners are here now for the purpose of learning and knowing all about your condition and we wish to hear from you the truth and nothing but the truth. We have read in our books and learned [**end of p. 1, handwritten text] from our officers that for many years whether right or wrong the Navajos have been at War with us, and that General Carleton had removed you here for the purpose of making you Agriculturists—with that view the Government of the United States gave you money and built this fort to protect you until you were able to protect yourselves. We find you have done a good deal of work here in making acequias, but we find you have no farms no herds, and are now as poor as you were four years ago when the Government brought you here. That before we

discuss what we are to do with you, we want to know what you have done in the past and what you think about your reservation here.

Barboncito, said:

The bringing of us here has caused a great decrease of our numbers many of us have died, also a great number of our animals. Our Grand-fathers had no idea of living in any other country except our own and I do not think it right for us to do so, as we were never taught to. When the Navajos were first created, four [**end of p. 2, handwritten text] mountains and four rivers were pointed out to us, inside of which we should live, that was to be our country, and was given to us by the first woman of the Navajo tribe. It was told to us by our forefathers, that we were never to move east of the Rio Grande or west of the San Juan rivers and I think that our coming here has been the cause of so much death among us and our animals. That our God when he was created (the woman I spoke of) gave us this piece of land and created it specially for us and gave us the whitest of corn and the best of horses and sheep. You can see them, (pointing to the other chiefs) ordinarily looking as they are, I think that when the last of them is gone the world will come to an end. It is true we were brought here, also true we have been taken good care of since we have been here– As soon as we were brought here we started into work making acequias (and I myself went to work with my party) we made all the Adobes you see here, we have always done as we were told to, if told to bring ashes from the hearth we would do so, carry water and herd stock, we never refused [**end of p. 3, handwritten text] to do anything we were told to do. This ground we were brought on, it is not productive, we plant but it does not yield, all the stock we brought here have nearly all died. Because we were brought here, we have done all that we could possibly do, but found it to be labor in vain, and have therefore quit it, for that reason we have not planted or tried

to do anything this year. It is true we put seed in the ground but it would not grow two feet high, the reason I cannot tell, only I think that this ground was never intended for us, we know how to irrigate and farm, still we cannot raise a crop here, we know how to plant all kinds of seed, also how to raise stock and take care of it. The Commissioners can see themselves that we have hardly any sheep or horses, nearly all that we brought here have died, and that has left us so poor that we have no means wherewith to buy others. There are a great many among us who were once well off, now they have nothing in their houses to sleep on except gunny sacks, true some of us have a little stock left yet but not near what we had some years ago, in our old country, for that reason [**end of p. 4, handwritten text] my mouth is dry, and my head hangs in sorrow to see those around me who were at one time well off, so poor now, when we had a way of living of our own, we lived happy, we had plenty of stock, nothing to do but look at our stock, and when we wanted meat nothing to do but kill it. (Pointing to the Chiefs present) they were once rich. I feel sorry at the way I am fixed here, I cannot rest comfortable at night, I am ashamed to go to the Commissary for my food, it looks as if somebody was waiting to give it to me, since the time I was very small until I was a man when I had my father and mother to take care of I had plenty and since that time I have always followed my fathers advise and still keep it viz: to live at peace with everybody. I want to tell the Commissioners I was born at the lower end of Canon-de-Chelle. We have been living here five winters. The first year we planted corn it yielded a good crop, but a worm got in the corn and destroyed nearly all of it, the second year the same, the third year it grew about two feet high when a hail storm completely destroyed all of it. We have done all we possibly could to raise a crop of corn and pumpkins but we were disappointed. I thought at [**end of p. 5, handwritten text] one time the whole world was the same as my own country but I got fooled in it outside my own

country we cannot raise a crop, but in it we can raise a crop almost anywhere, our families and stock there increase, here they decrease, we know this land does not like us, neither does the water. They have all said this ground was not intended for us, for that reason none of us have attempted to put in seed this year. I think now it is true what my forefathers told me about crossing the line of my own country. It seems that whatever we do here causes death, some work at the Acequias take sick and die, others die with the hoe in their hands; they go to the river to their waists and suddenly disappear, others have been struck and torn to pieces by lightning. A Rattlesnake bite here kills us, in our own country a Rattlesnake before he bites gives warning which enables us to keep out of its way and if bitten we readily found a cure, here we can find no cure. When one of our big men die, the cries of the women causes the tears to roll down on to my moustache. I then think of [**end of p. 6, handwritten text] my own country. I think the Commissioners have seen one thing, when we came here there was plenty of mosquite root which we used for fuel now there is none nearer than the place where I met the Commissioners 25 miles from here and in the winter many die from cold and sickness and overworking in carrying wood such a long distance on their backs, for that reason we cannot stay contented where we now are. Some years ago I could raise my head and see flocks of cattle in any direction, now I feel sorry I cannot see any; I raise my head and can see herds of stock on my right and left but they are not mine, it makes me feel sorry thinking of the time when I had plenty. I can scarcely endure it, I think that all nations round here are against us (I mean Mexicans and Indians) the reason is that we are a working tribe of Indians, and if we had the means we could support ourselves far better than either Mexican or Indian. The Comanches are against us I know it for they came here and killed a good many of our men. In our own country we knew nothing about the Comanches. Last winter I heard said that there was [**end of p. 7,

handwritten text] a Commission coming here, now I am happy it has arrived for I expect to hear from the Commission today the object of its coming here– We have all declared that we do not want to remain here any longer if I can complete my thoughts today I will give the General my best thanks and think of him as my father and mother. As soon as I heard of your coming I made three pair of moccasins and have worn out two pair of them since, as you see yourselves I am strong and hearty and before I am sick or older I want to go and see the place where I was born, now I am just like a woman, sorry like a woman in trouble I want to go and see my own country. If we are taken back to our own country we will call you our father and mother, if you should only tie a goat there we would all live off it, all of the same opinions. I am speaking for the whole tribe, for their animals from the horse to the dog, also the unborn, all that you have heard now is the truth and is the opinion of the whole tribe– It appears to me that the General commands the whole thing as a god I hope therefore he will do all he can for the Indians–this hope goes [**end of p. 8, handwritten text] in at my feet and out at my mouth I am speaking to you (General Sherman) now as if I was speaking to a spirit and I wish you to tell me when you are going to take us to our own country.

General *Sherman*, said:

I have listened to all you have said of your people and believe you have told us the truth. You are right, the world is big enough for all the people it contains and all should live at peace with their neighbors. All people love the country where they were born and raised, but the navajos are very few indeed compared with all the people in the world, they are not more than seven leaves to all the leaves you have ever seen–still we want to do to you what is right–right to you–and right to us, as a people; If you will live in peace with your neighbors, we will see that your neighbors will be at peace with you–The

government will stand between you and other Indians and Mexicans. We have got a map here which if Barboncito can understand I would like to show him a few points on it [**end of p. 9, handwritten text] shows him his own country, places inhabited by other Indians–the four mountains spoken of and old Fort Defiance–tells him that in our country nearly every family raises a crop, or works at a trade , everybody does something for a living, those who work hard get rich, those who are lazy are poor, also in the Upper Country the ground is high and requires irrigation, in the lower country there is plenty of water, and corn can be raised without irrigation. For many years we have been collecting Indians on the Indian Territory south of the Arkansas and they are now doing well and have been doing so for many years. We have heard you were not satisfied with this reservation and we have come here to invite some of your leading men to go and see the Cherokee country and if they liked it we would give you a reservation there. There we will give you cattle to commence with and corn, it being much cheaper there than here; give you schools to educate your children in english or spanish and take care of you until such time as you will be able to protect yourselves– We do not want you to take our word for it–but send some of your wisest men to see [**end of p. 10, handwritten text] for themselves. If you do not want that we will discuss the other proposition of going back to your own country and if we agree we will make a boundary line outside of which you must not go except for the purpose of trading–we must have a clearly defined boundary line and know exactly where you belong to, you must live at peace and must not fight with other Indians, If people trouble you, you must go to the nearest military post and report to the Commanding Officer who will punish those who trouble you. The Army will do the fighting, you must live at peace, if you go to your own country the Utes will be the nearest Indians to you, you must not trouble the Utes and the Utes must not trouble you– If however the Utes or Apaches

come into your country with bows and arrows and guns you of course can drive them out but must not follow them beyond the boundary line. You must not permit any of your young men to go to the Ute or Apache country to steal neither must they steal from Mexicans. You can come to the Mexican towns to trade. Any Navajo can now settle in this Territory and he will get a piece of [**end of p. 11, handwritten text] land not occupied, but he will be subject to the laws of the country. Our proposition now is to send some of you at the Government expense to the Indian Territory south of Kansas, or if you want to go to your own Country you will be sent, but not to the whole of it, only a portion which must be well defined.

Barboncito, said:

I hope to God you will not ask me to go to any other country except my own, It might turn out another Bosque Redondo, they told us this was a good place when we came, but it is not.

General *Sherman*, said:

We merely made the proposition to send you to the lower Arkansas country for you to think seriously over it– Tomorrow at 10 o'clock I want the whole tribe to assemble at the back of the Hospital and for you then to delegate ten of your men to come forward and settle about the [**end of p. 12, handwritten text] boundary line of your own country which will be reduced to writing and signed by those ten men.

Barboncito, said:

I am very well pleased with what you have said, and if we go back to our own country, we are willing to abide by whatever orders are issued to us, we do not want to go to the right or left but straight back to our own country.

General *Sherman*, said:

This is all we have to say to-day to-morrow we will meet again.

The Council accordingly adjourned until to-morrow the 29th instant at 10 o'clock A.M.

PROCEEDINGS OF A COUNCIL WITH THE NAVAJO INDIANS
2nd Day, May 29, 1868

Fort Sumner, New Mexico
May 29th, 1868

The Council met according to adjournment. Present the Commissioners on the part of the United States Government. On the part of the Indians the Navajo Nation or Tribe.

General *Sherman* said:

We have come from our Capitol, Washington, where our Government consists of a President and a great Council. We are empowered to do now what is necessary for your good, but, what we do must be submitted to our Great Father in Washington. We heard that you were not satisfied with this Reservation, that your crops failed for three years and that you wanted to go somewhere else, we know that during the time you have been here the Government has fed and done for you what was considered necessary to make you a thriving people; Yesterday we had a long talk with your principal chiefs and then told them, that any Navajo could go wherever he pleased in this Territory and settle with his family but if he did so would be subject to the laws of the Territory as a citizen, or we would remove you as a nation or tribe to the lower Canadian and Arkansas if you were pleased to go there– but if neither of those propositions suited you, we would discuss the other proposition of [**end of p. 1, handwritten text] sending you to your own country west of the Rio Grande. Barboncito yesterday insisted strongly on going back to his own country in preference to the other two propositions. We then asked him and all the Navajos to assemble here today and for them to select (10) ten of their number as delegates with whom we would conclude terms of treaty . We want tc know if these men have been chosen; the ten men then stood up, viz;

Delgadito;
Barboncito;
Manuelito;
Sargo;
Herrero;
Chiqueto;
Muerto de Hombre;
Hombro;
Narbono and Armijo.

and the Navajoes upon being asked if satisfied with these ten men, unanimously responded–Yes–We will now consider these ten men your principal men and we want them to select a chief the remaining to compose his Council for we cannot talk to all the Navajoes. Barboncito was unanimously elected Chief. – now from this time out you must do as Barboncito tells you, with him we will deal and do all for [**end of p. 2, handwritten text] your good. – When you leave here and go to your own country, you must do as he tells you, and when you get to your country, you must obey him or he will punish you, if he has not the power to do so, he will call on the Soldiers and they will do it. You must all keep together on the march. Must not scatter for fear some of your young men might do wrong and get you all into trouble. All these things will be put down on paper and tomorrow these ten men will sign that paper, and now we want to know about the country you want to go to. We heard Barboncito, yesterday, if there are any others who differ from him, we would like to hear them, we want also to hear if you want Schools in your country.

Blackmiths or Carpenters Shops. We want to put everything on paper so that hereafter there may be no misunderstanding between us; we want to know if the whole Navajo nation is represented by those present and if they will be bound by the acts of those ten men.–unanimous response of "yes".

Barboncito said:

What you have said to me now I never will forget. It is true I never liked this place, and fell sorry for being here, from here [**end of p. 3, handwritten text] I would like to go back the same road we came, by way of Tecalote, Bernal, Tijeras and Paralto. All the people on the road are my friends. After I cross the Rio Grande river I want to visit the Pueblo villages, I want to see the Pueblo Indians to make friends with them. I then want to go to Canon de Chelly – leaving Pueblo village Laguna to the left. I will take all the Navajos to Canon de Chelley, leave my own family there – taking the rest and scattering them between San Mateo mountain and San Juan river. I said yesterday this was the heart of the Navajo country. In this place there is a mountain called the Sierra Chusque or mountain of agriculture from which (when it rains) the water flows in abundance creating large sand bars on which the Navajoes plant their corn; it is a fine country for stock or agriculture – there is another mountain called the Mesa Calabasa where these beads which we wear on our necks have been handed down from generation to generation and where we were told by our forefathers never to leave our own country. For that reason I want to go back there as quick as possible and not remain here another day. When the Navajos go back to their own country I want to put them in different places, it would [**end of p. 4, handwritten text] not do to put them all together as they are here, if separated they would be more industrious. There is one family whose intention I do not know the (Cibollettas) (Savietias) I do not know whether or not they want to go back to their own country.

General *Sherman* said:

If the "Cibollettas" "Savietias" choose they can go and live among the Mescicans in this Territory, but if they do they will not be entitled to any of the advantages of the treaty.

Barboncito said:

I merely wished to mention it for if they remain with the Mescicans I cannot be held responsible for their conduct. You spoke to me yesterday about putting us on a reservation with a boundary line, I do not think it right to confine us to a certain part we want to have the privilege of going outside the line to hunt and trade.

General *Sherman* said:

You can go outside the line to hunt. – You can go to a mescican town to trade but your farms and homes must be inside the boundary line, beyond which you have no claim to the land. [**end of p. 5, handwritten text]

Barboncito said:

That is the way I like to be and return the Commissioners my best thanks. After we get back to our country it will brighten up again and the Navajoes will be as happy as the land, black clouds will rise and there will be plenty of rain, corn will grow in abundance, and everything look happy. Today is a day that anything black or red does not look right everything should be white or yellow representing the flower and the corn. I want to drop this conversation now and talk about Navajo children held as prisoners by mescicans. Some of those present have lost a brother or a sister and I know that they are in the hands of Mescicans, I have seen some myself.

General *Sherman* said:

About their children being held as peons by Mescicans– you ought to know that there is an Act of Congress against it. About four years ago we had slaves and there was a great war about it, now there are none. Congress our great council passed a law prohibiting peonage in New Mexcico, so that if any Mescican holds a Navajo in peonage he (the Mescican) is liable to be put in the penitentiary. We do not know [**end of p. 6, handwritten text] that there are any Navajos held by Mescicans as

peons, but if there are, you can apply to the judges of the Civil Courts and the Commissioners. They are the proper persons, and they will decide whether the Navajo is to go back to his own people or remain with the Mescican. That is a matter with which we have nothing to do. What do you say about schools. Blacksmith and Carpenter Shops for the purpose of teaching your children?

Barboncito said:

We would like to have a blacksmith shop as a great number of us can work at the trade, we would like a carpenter's shop and if a school was established among us I am satisfied a great number would attend it. I like it very well. Whatever orders you leave here you may rely upon their being obeyed.

General *Sherman* said:

Whatever we promise to do you can depend upon its being done.

Colonel *Samuel F. Tappan* asked:

How many Navajoes are among the Mescicans now?

Answer: Over half of the tribe.

Question: How many have returned within the five years? [**end of p. 7, handwritten text]

Answer: Cannot tell.

General *Sherman* said:

We will do all we can to have your children returned to you. Our government is determined that the enslavement of the Navajo shall cease and those who are guilty of holding them as peons shall be punished.

All are free now in this country to go and come as they please, if children are held in peonage the courts will decide;

you can go where any Navajoes are and General Getty will give you an order or send a soldier and if the Navajo peon wishes to go back or remain he can please himself, we will not use force, the courts must decide. Tomorrow we will meet with those ten men chosen and enter into business with them committing it to writting which they must sign.

The Council then adjourned until 9 o'clock tomorrow the 30th instant.

PROCEEDINGS OF COUNCIL WITH THE NAVAJO INDIANS
3rd Day, May 30, 1868

Fort Sumner, New Mexico
May 30th, 1868

The Council met according to adjournment. Present the Commissioners on the part of the United States, and on the part of the Navajo tribe the ten chiefs or Headmen chosen by the tribe at yesterdays Council as their representatives.

General *Sherman* said:

We are now ready to commence business, we have it all written down on paper and settled, and when agreed on, we will have three copies made, one for you, one to keep ourselves and one to send to Washington– We do not consider it complete until we have all signed our names to it. I will now read it to you, and any changes that may be considered necessary will be made.

The treaty was then read by General Sherman, and interpreted to the Indians, and approved by them.

Then General *Sherman* said:

We have marked off a reservation for you, including the Canon de-Chelly, and part of the valley of the San Juan, it is about (100) one hundred miles square [**end of p. 1, handwritten text] It runs as far south as Canon Bonito, and includes the Chusca Mountain, but not the Mesa Calabesa you spoke of; that is the reservation we suggest to you, it also includes the Ceresca mountain, and the bend of the San Juan river, not the upper waters.

Barboncito said:

We are very well pleased with what you have said, and well satisfied with that reservation it is the very heart of our Country and is more than we ever expected to get.

We wish now to have *Narbono* segundo, and *Ganado Mucho* admitted as members of our Council, in addition to the ten elected yesterday; which was agreed to.

General *Sherman* then asked:

How would old Fort Defiance suit you as a site for your agency?

Answer: Very well.

Ganado Mucho said:

After what the Commissioners have said, I do not think anybody has anything to say, After we go back to our own country it will be the same as [**end of p. 2, handwritten text] it used to be– We have never found any person heretofore who told us what you now have, and when we return to our own country, we will return you our best thanks. We understand the good news you have told us to be right, and we like it very much; we have been waiting for a long time to hear the good words you have now told us, about going back to our own Country, and I will not stop talking, until I have told all the tribe the good news.

General *Sherman* said:

Now we will adjourn, until Monday the 1st day of June 1868 at 9 o'clock A.M when we will meet and sign the treaty.

The Council accordingly adjourned until Monday the 1st day of June 1868 at 9 o'clock A.M.

APPENDIX "J"

EXCERPTS FROM THE NAVAJO TRIBAL CODE

Title 7, Chapter 3, Section 204 of the Navajo Tribal Code,

7 N.T.C. § 204 provides:

§ 204. Law applicable to civil actions

(a) In all civil cases the Court of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinance or custom of the Tribe, not prohibited by such Federal law.

(b) Where any doubt arises as to the customs and usages of the Tribe the court may request the advice of counsellors familiar with these customs and usages.

(c) Any matters that are not covered by the traditional customs and usages of the Tribe, or by applicable Federal laws and regulations, shall be decided by the Court of the Navajo Tribe according to the laws of the state in which the matter in dispute may lie.

Title 7, Chapter 3, Section 251 of the Navajo Tribal Code,

7 N.T.C. § 251 provides:

§ 251. Composition; appointment.

(a) The Trial Court of the Navajo Tribe shall consist of seven judges who shall be appointed by the Tribal Council, with the approval of the Tribal Council, for two-year probationary terms.

(b) Any member of the Navajo Tribe of Indians over the age of 30 years who has never been convicted of a felony, or, within the year just past, of a misdemeanor, shall be eligible to be appointed probationary judge of the Trial Court of the Navajo Tribe.

(c) The Chairman shall require the successful completion of a course of training by probationary judges as a prerequisite to nominating them for permanent appointments.

(d) At any time during the probationary term of any judge, regardless of the length of service of such judge, the Judiciary Committee may recommend to the Chairman of the Navajo Tribal Council that the probationary judge be removed from office. The Chairman of the Navajo Tribal Council, pursuant to such recommendation, may remove such probationary judge from office. Any judge so removed shall not be eligible for the status of retired judge and shall not be called to sit in any case pursaunt to 7 N.T.C. § 353. At the conclusion of the two-year probationary term, the Judiciary Committee shall review the record and qualifications of each probationary judge and shall recommend to the Chairman whether or not each probationary judge has satisfactorily completed the probationary term and should be appointed to a permanent position. The Chairman shall not appoint to a permanent position any judge not recommended by the Judiciary Committee, but the Chairman, at his discretion, may appoint any judges approved by the Judiciary Committee to permanent positions. The appointment shall be submitted to the Navajo Tribal Council for approval.

Title 7, Chapter 3, Section 572 of the Navajo Tribal Code,

7 N.T.C § 572 provides:

§ 572. Duties

(a) The Judiciary Committee shall agree upon and determine qualifications to be required of judges in order to serve the best interests of the Navajo Tribe. All decisions of the Committee shall be by majority vote.

(b) After determining the qualifications to be required for judicial appointment, the Judiciary Committee shall thereafter consider all eligible candidates or applicants and select a panel consisting of those possessing the highest qualifications. By and with the consent of the Council, the Chairman shall appoint judges from among those named on such panel.

Title 7, Chapter 5, Section 654 of the Navajo Tribal Code,

7 N.T.C. § 654 provides:

§ 654. Eligibility of jurors

Any Navajo Indian over the age of 21 years, of at least ordinary intelligent, and not under judicial restrain, shall be eligible to be a juror.

Title 7, Chapter 5, Section 801 of the Navajo Tribal Code,

7 N.T.C. § 801 provides:

§ 801. Permission to appeal.

(a) Every person aggrieved by any final judgment or other final order of the Trial Court of the Navajo Tribe,

except in those criminal cases where no right of appeal exists, must within 30 days after the day such judgment or order was rendered request permission from the Chief Justice to appeal to the Court of Appeals, stating the reasons why he wanted to appeal. Such requests and statements should preferably be made in writing, but the Chief Justice may permit oral requests and statements to be made to him.

(b) If the Chief Justice thinks the reasons show probable cause for review of the decision of the Trial Court, he shall permit the appeal and assign it for hearing before the Court of Appeals.

Title 1, Chapter 1, Sections 1 through 8 of the Navajo Tribal Code, 1 N.T.C. §§ 1, 2, 3, 4, 5, 6, 7, 8, provide:

§ 1. Freedom of religion, speech, press, and right of assembly and petition.

The Navajo Tribal Council shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Navajo Government for a redress of grievances.

§ 2. Right to keep and bear arms.

The right of the people to keep and bear arms for peaceful purposes, shall not be infringed.

§ 3. Governmental use of houses.

No Governmental use shall be made of any house, without the consent of the owner, except in a manner to be prescribed by resolution.

§ 4. Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

§ 5. Double jeopardy; self-incrimination; deprivation of property.

No person shall be subject for the same offense to be twice put in jeopardy of liberty, or property; nor shall he be compelled in any criminal case to be a witness against himself; nor shall private property be taken for public use, without just compensation.

§ 6. Rights of accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with witnesses against him; and shall have compulsory process for obtaining witnesses in his favor.

§ 7. Cruel and unusual punishment; excessive bail and fines.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

§ 8. Other rights not impaired.

The enumeration herein of certain rights, shall not be construed to deny or disparage others retained by the people.

The Preamble to Title 1, Chapter 1, Sections 1 through 8 of the Navajo Tribal Code, 1 N.T.C. §§ 1, 2, 3, 4, 5, 6, 7, 8, Navajo Tribal Council Resolution CO-63-67, provides:

> Whereas: A declaration of the basic Navajo human rights is deemed to be necessary to the preservation of, and in keeping with, the dignity of the Navajo people.

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ALEXANDER L. STEVAS
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No. 83-610

In The
Supreme Court of the United States
October Term, 1983

BABBITT FORD, INC.,
an Arizona Corporation,
Petitioner,

vs.

THE NAVAJO INDIAN TRIBE,
through its Chairman, Peterson Zah, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Navajo Tribe retains the inherent sovereign power to regulate the on-reservation commercial activities of non-Indians?

2. Whether the treaties between the Navajo Tribe and the United States divest the Navajo Tribe of all civil jurisdiction over non-Indians?

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

No. 83-610

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Petitioner's Appendix (Pet. App.) 1-24) is reported at 710 F. 2d 587-601 (9th Cir. 1983). The opinion of the United States District Court for the District of Arizona (Pet. App. 26-52) is reported at 519 F. Supp. 418-434 (D. Ariz. 1983).

JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals was entered on July 15, 1983. No petition for rehearing was filed. The jurisdiction of this Court is invoked by the Petitioners under 28 U. S. C. Sections 1254(1).

STATUTORY PROVISIONS INVOLVED

The Navajo law, Title 7, Navajo Tribal Code, §§ 607-609 (7 N. T. C. §§ 607-609) provides:

> § 607. Repossession of personal property
>
> The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following: (1) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand. (2) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe, the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding. (Navajo Tribal Council Resolution CF-26-68, February 7, 1968).
>
> § 608. Violations — Penalty
>
> (a) Any non-member of the Navajo Tribe, except persons authorized by Federal law to be present on Tribal land, found to be in wilful violation of 7

N. T. C. § 607 may be excluded from land subject to the jurisdiction of the Navajo Tribe in accordance with the procedure set forth in 17 N. T. C. §§ 1903-1906.

(b) Any business whose employees are found to be in wilful violation of 7 N. T. C. § 607 may be denied the privilege of doing business on land subject to the jurisdiction of the Navajo Tribe.

(c) Any Indian who violates any provision of 7 N. T. C. § 607 shall be guilty of a crime, and upon conviction shall be punished by a fine of not more than $100. (Navajo Tribal Council Resolution CF-26-68, February 7, 1968).

§ 609. Civil liability.

Any person who violates 7 N.T.C. § 607 and any business whose employee violates such section is deemed to have breached the peace of lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with 7 N. T. C. §§ 607-609.

If the personal property repossessed is consumer goods (to wit: goods used or bought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

Purchaser means the person who owes payment or other performance of an obligation secured by personal property, whether or not the purchaser owns or has rights in the personal property. (Navajo Tribal Council Resolution CJN-53-69, June 4, 1969).

Relevant portions of the Navajo Treaties are set forth in the Petitioner's brief.

I. Introduction

The Petitioner has grossly exaggerated the effect which the Navajo laws at issue have upon various commercial transactions. Pursuant to 7 N.T.C. § 607-609, the Navajo Tribe merely seeks to limit the use of "self-help" repossession to those cases in which the debtor does not dispute the retaking of his property, as evidenced by his written consent. In those cases in which the debtor disputes the repossession, the Navajo law requires that this dispute be resolved in a judicial forum. There are ample safeguards to insure that the judicial proceeding is neither costly nor time-consuming and that the security is protected during the course of this proceeding. *See,* "Rules of Pleading, Practice and Procedure for Repossession of Personal Property," Navajo Nation Judicial Rules. The Navajo repossession law merely injects some minimal due process into a conflict that is frequently otherwise resolved in other jurisdictions by the use of force, stealth, or deceit. By requiring that conflicts be resolved in the courtroom rather than in the street, this law insures that lives and property are protected, prevents sharp credit practices, and promotes the general welfare of the Navajo people.

The propriety of non-judicial repossessions has been increasingly questioned in recent years. As this Court has noted, an opportunity to be heard prior to the loss of property can prevent "substantially unfair and simply mistaken deprivations of property." *Fuentes v. Shevin,* 407 U.S. 67, 81-82 (1972). A number of groups which have studied the issue have recommended that the "self-help" remedy be prohibited by law. *See e.g.,* The National Commission for Consumer Finance, *Consumer*

Credit in the United States (1972); National Consumer Act §§ 5.204, 5.208; Model Consumer Credit Act § 7.202. The State of Wisconsin has enacted legislation which, like the Navajo law, prohibits self-help repossession. *See* Wisconsin Consumer Act, W. S. A. §§ 425.206, 425.305. The State of Louisiana also prohibits non-judicial repossession. La. Code Civ. Pro. art. 2631 *et seq.* and art. 851 *et seq.* Those commentators who have reviewed the effects of such legislation have concluded that it has not had an adverse effect upon the availability of credit, and that it has resulted in an increase in negotiated settlements, to the economic advantage of both parties. Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act,* 1975 Wis. L. Rev. 607 (1975); Grau & Whitford, *The Impact of Judicializing Repossession: The Wisconsin Consumer Act Revisited,* 1978 Wis. L. Rev. 983 (1978).

The Petitioner's conjectures as to the possible drastic impacts which may result from this law and its significance to national consumer credit practices are wholly without foundation. The law at issue is a reasonable means to protect the health and welfare of the Navajo people and all of those subject to the jurisdiction of the Navajo Tribe.

II. The decision of the Ninth Circuit that the Navajo Tribe retains civil jurisdiction over non-Indians is correct and does not conflict with other relevant decisions.

The decision of the Ninth Circuit is derived directly from longstanding authority which recognizes Indian

tribes as being "distinct, independent political communities, retaining their original natural rights" in matters of local government. *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 559 (1832); *United States v. Mazurie*, 419 U. S. 44 (1975). The Navajo Tribe has been acknowledged to retain the power to be governed by its own laws, and to enforce those laws in its own forums. *Williams v. Lee*, 358 U. S. 217 (1959). The Navajo Tribe is also acknowledged to possess attributes of sovereignty over both its members and its territory. *United States v. Wheeler*, 435 U. S. 313, 323 (1978).

Tribal civil authority over non-Indians is derived not only from the inherent powers necessary to self-government and territorial management, but also from the power to exclude non-members from tribal land. *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130, 141-144 (1982); *see also*, Navajo Treaty of 1868, Article II. In the exercise of this sovereign power, the Navajo Tribe has the power to place conditions on entry to its lands, on the continued presence there, and on reservation conduct. *Id.* at 144-145. At issue is nothing more than the legitimate exercise of these powers.

The exercise of Navajo sovereign power is not prohibited by this Court's decisions in *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191 (1978) or *Montana v. United States*, 450 U. S. 544 (1981). There is no criminal jurisdictional issue involved here and by the very analysis employed in *Oliphant*, this exercise of jurisdiction must be affirmed. The *civil* authority of Indian tribes over non-Indians has long been upheld by the Executive Branch,[1]

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[1] 7 Op. Att'y Gen. 174, 177, 178 (1855); 23 Op. Att'y Gen. 214 (1900); 55 Interior Dec. 14, 50 (1934); Op. Sol. Int. Oct. 13, 1976.

Congress,[2] and the opinions of this Court. *Merrion v. Jicarilla Apache Tribe, supra; Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980); *Williams v. Lee, supra.* The tests employed in *Montana v. United States, supra* to determine the extent of Indian jurisdiction over non-Indian use of fee lands within a reservation are also met. At issue is the regulation of the on-reservation commercial activities of non-Indians who enter into consensual relationships with tribal members. *Compare Id.* at 565-566. The Court below also concluded that this legislation is designed to keep reservation peace and protect the health and safety of tribal members. *Babbitt Ford, Inc. v. Navajo Tribe*, 710 F. 2d 587, 593 (9th Cir. 1983). The conduct so regulated clearly "threatens or has some direct effect on the . . . economic security, or the health or welfare of the Tribe." *Compare, Montana v. United States*, 450 U. S. at 566.

Furthermore, the decision of the Ninth Circuit is in accord with earlier decisions from that Court, as well as from other jurisdictions, which have upheld tribal sovereignty. *See, eg., Cardin v. De La Cruz*, 671 F. 2d 363 (9th Cir. 1982) *cert. denied*, — U. S. —, 103 S. Ct. 293 (1982); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F. 2d 951 (9th Cir. 1982); *cert. denied* — U. S. —, 103 S. Ct. 314 (1982); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F. 2d 900 (10th Cir. 1982); *Schantz v. White Lightning*, 502 F. 2d 67, 70 (8th Cir. 1974); *Hot Oil Serv-*

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[2]S. Rep. No. 698, 45th Cong., 3rd Sess. 1-2 (1879); Compare also the extensive legislation in the criminal area and the complete absence of federal legislation in the civil area. See, F. Cohen, *Handbook of Federal Indian Law*, (1982 ed.) at 253.

ice, Inc. v. Hall, 366 F. 2d 295 (9th Cir. 1966); *Cowan v. Rosebud Sioux Tribe,* 404 F. Supp 1338 (D.S.D. 1975); *Enriquez v. Superior Court,* 115 Ariz. 342, 565 P. 2d 522 (Ariz. App. 1977); *Schantz v. White Lightning,* 231 N. W. 2d 812 (N. D. 1975); *Nelson v. Dubois,* 232 N. W. 2d 54 (N. D. 1975).

The cases offered by the Petitioner as being in conflict with this decision of the Ninth Circuit simply are not. In *Brown v. Babbitt Ford, Inc.,* 117 Ariz. 192, 571 P. 2d 69 (Ariz. App. 1977), the Arizona Court of Appeals expressly reserved judgment on the questions decided by the Ninth Circuit in the present case. The Arizona court stated that the issues of whether the Navajo Tribe has jurisdiction over non-Indians, whether Tribal Court judgments based on the repossession law would be valid in Arizona, and whether the State could enforce its own laws on the Reservation, were not before it. *Id.* at 691. At issue was merely a conflict of laws question, resolved under Arizona law by the language of the contract at issue.

American Indian Agricultural Credit Consortium, Inc. v. Fredricks, 551 F. Supp. 1020 (D. Colo. 1982) merely raised a federal diversity jurisdiction question. The Court held that the absence of state jurisdiction, due to Indian sovereignty, did not necessarily imply that the Federal Court could not obtain Federal diversity jurisdiction over the dispute. This conclusion is in no way inconsistent with the decision at issue.

Nor do the Minnesota decisions upon which Petitioner seeks to rely have application to this case. *Duluth Lumber and Plywood Company v. Delta Development, Inc.,* 281 N. W. 2d. 377 (Minn. 1979); *State v. Red Lake D. F. L.*

Committee, 303 N. W. 2d 54 (Minn. 1981). Minnesota, unlike Arizona, is a Public Law 280 state. It has assumed various responsibilities for the reservations within its borders and has been federally authorized to exercise jurisdiction over them. 25 U. S. C. §§ 1321-1326. Arizona has not done the same, and its jurisdiction is necessarily limited. *Francisco v. State,* 113 Ariz. 427, 556 P. 2d 1 (1976). Therefore, the conclusions of the cases cited by Petitioner as to the effect of state law on Indian reservations in Minnesota have no application to the Arizona situation and do not conflict with the holding of the Ninth Circuit.

Those cases relied upon by the Petitioner which limit tribal jurisdiction to the territory of the Tribe are readily distinguishable on that basis. *National Farmers Union Insurance Company v. Crow Tribe of Indians,* 560 F. Supp. 213 (D. Mont. 1983); *UNC Resources, Inc. v. Benally,* 514 F. Supp. 358 (D. N. M. 1981); *UNC Resources, Inc. v. Benally,* 518 F. Supp. 1046 (D. Ariz. 1981). These Respondents agree that there is "a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker,* 448 U. S. 136, 151 (1980); *accord, Merrion v. Jicarilla Apache Tribe,* 455 U. S. 130, 142 (1982). However, in the situation at issue, all of the relevant events occurred within the exterior boundaries of the Navajo Nation. The repossession was on Tribal land, the adversely affected parties are members of the Tribe, the property was located on the Reservation, and all possible adverse effects to health, safety and other property would occur on the Reservation.

The decision in *Little Horn State Bank v. Stops,* 555 P. 2d 211 (Mont. 1976) is also distinguishable. In that case, the Montana Supreme Court concluded that a writ

of execution from the State Court was valid when levied against Indian property located on an Indian Reservation. Because the Crow Tribe had no applicable laws nor any legal forum available for this matter, the Court concluded that such action did not interfere with tribal self-government. It must be noted that the Navajo Tribal Courts do recognize and enforce foreign judgments and that the Navajo Nation has legislated comprehensively with regard to the procedures for repossession. 7 N.T.C. §§ 607-609. Therefore, the Montana rationale would not be applicable here. It should also be noted that the reasoning of the Montana Court has been rejected by other Courts which have considered similar situations. *See, Joe v. Marcum,* 621 F. 2d 358, 362 (10th Cir. 1980); *Annis v. Dewey County Bank,* 335 F. Supp. 133 (D. S. D. 1971).

The decision of the Ninth Circuit is correct and in accord with all relevant precedent.

III. The Navajo Treaties do not divest the Navajo Tribe of civil jurisdiction over the Petitioner.

Petitioner's treaty interpretations cannot be reconciled with the basic principles of Indian law. As the Ninth Circuit noted, "the law is settled that simply because a treaty fails to delineate specific powers of a tribe does not mean that the tribe has been divested of such powers." *Babbitt Ford, Inc. v. Navajo Indian Tribe, supra* at 596, *citing United States v. Wheeler,* 435 U. S. 313 (1978); *McClanahan v. Arizona State Tax Commission,* 411 U. S. 164 (1973); *Williams v. Lee,* 358 U. S. 217 (1959). A treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States v. Wheeler,* 435 U. S. at 327 n.

24. Moreover, the Courts will not acknowledge an intent to restrict tribal sovereignty unless that intent is clear. *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 59 (1978). Any doubtful expressions are to be interpreted in favor of the Indians. *McClanahan v. Arizona State Tax Commission, supra* at 174.

Petitioners have pointed to no single treaty provision which removes the jurisdiction at issue from the Navajo Tribe. Nor, contrary to Petitioner's assertions, have any of the numerous courts which have reviewed these provisions held that these treaties divest any form of jurisdiction. That the treaties may create concurrent Federal jurisdiction does not imply that Tribal jurisdiction is abolished. *United States v. Wheeler*, 435 U. S. 313 (1978). Nor does Petitioner's extensive discussion of the law applicable to Indians who chose to settle *off* the reservation in any way limit the on-reservation powers of the Tribe. The interpretations proposed by the Petitioners cannot be reconciled with the previous interpretations of these same treaties made in *United States v. Wheeler*, 435 U. S. 313 (1978); *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973); and *Williams v. Lee*, 358 U. S. 217 (1959) nor of the identical language in the Crow treaty at issue in *Montana v. United States*, 450 U. S. 544 (1981). Petitioner's arguments simply have no merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Ninth Circuit should be denied.

Respectfully submitted,

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CLERK

No. 83-610

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OCTOBER TERM, 1983

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Petitioner,

vs.

THE NAVAJO INDIAN TRIBE, through its Chairman, PETERSON ZAH; THE NAVAJO TRIBAL COURTS, through its Chief Justice, NELSON J. McCABE; THE NAVAJO TRIBAL POLICE, through its Superintendent, WILBUR KELLOGG; TOM SELLERS and LORRAINE SELLERS, husband and wife; BARNEY JOE and ALICE JOE, husband and wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

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*Pursuant to Supreme Court Rule 28.1 we avow to the Court that Petitioner Babbitt Ford, Inc., neither possesses nor is a part of any other parent company, subsidiary, or affiliated corporation or other entity.

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases: Page

Cases — Page

Cases **Page**

PETITIONER'S REPLY MEMORANDUM

Because the secured sales contract, through which the reservation Indian voluntarily grants to Babbitt Ford the contractual right to effect peaceful, self-help repossession upon default, is executed and performed outside of the Navajo Indian Reservation, the issue in this case is not, as Respondents would have it, whether or not the Navajo tribe can "regulate" on-reservation commercial activities of non-Indians. Rather, the issue is whether the Navajo Tribe can unilaterally alter or contradict the rights granted through off-reservation commercial transactions between individual Indians and non-Indians so as to penalize the non-Indian party who does no more than exercise his contractual rights while, at the same time, rewarding the defaulting Indian purchaser for his contractual breach.

Notwithstanding Respondents' claims to the contrary, by holding that the Navajo Tribe possesses the inherent, sovereign power to restrict Babbitt Ford's contractual right to effect a peaceful, self-help repossession, the Ninth Circuit's decision here squarely conflicts with the Arizona Court of Appeal's decision in *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d. 689 (App., 1977) which held that:

> The parties have by their contract made a choice of law covering the transaction. First, by granting to seller [Babbitt Ford] all rights granted by the Arizona Uniform Commercial Code, including the right to self help in repossession upon default, and second, by specifically stating that the contract would be interpreted and enforced under Arizona law.
>
> *By doing so, the parties have by contract excluded the possibility that this contract would be affected by the provisions of the Navajo Tribal Court.* Applying the agreement of the parties to this transaction, *it is clear that Babbitt had the right under Arizona law to do exactly what it did in repossessing the pickup without liability.* 571 P.2d. at 696, emphasis added.

Moreover, Respondents' attempts to distinguish the other cases discussed in the Petition (pp. 9-13) fails to recognize the fundamental conflict of principle, analysis, and application of prior decisions of this Court which has led to decisions at odds with the Ninth Circuit's holding here. While the decisions discussed in the Petition, especially *Little Horn State Bank v. Stops*, 555 P.2d. 211 (Mont., 1976), *cert. denied*, 431 U.S. 924 (1977), *Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 287 N.W.2d. 377 (Minn., 1979) and *American Indian Agricultural Credit Consortium, Inc. v. Fredericks*, 551 F.Supp. 1020 (D.Colo., 1982), hold that tribal law and tribal self-government cannot affect the construction, application and enforcement of private, off-reservation contracts between individual Indians and non-Indians even if enforcement of the contract's terms occurs on the reservation, the Ninth Circuit here reaches a contrary result. While the cases discussed in the Petition recognize that individual Indians cannot interpose their special status as Indians to shield them from the full measure of their off-reservation contractual obligations, the Ninth Circuit here holds that individual Indians can indeed retreat into a reservation sanctuary where they may violate the terms of their off-reservation contract and interpose their so-called special status to immunize them from the contractually specified, remedial consequences of their breach.

Indeed, Respondents themselves recognize that the reasoning of the cases discussed in the Petition "has been rejected by other Courts which have considered similar situations." (Respondents' Brief in Opposition, p. 10.) Respondents thus concede that confusion and conflict in the application of this Court's decision to this issue has existed for over a decade among federal and state appellate and trial courts. Only this Court can resolve this decisional stalemate.

Respondents' assertion that the decision of the Court below is well grounded in the decisions of this Court is simply erroneous. By asserting that the tribal laws at issue here are "reasonable means to protect the health and welfare of the Navajo

people and all those subject to its jurisdiction," (Respondents' Brief in Opposition, p. 5), Respondents, like the Court below, set up an analytical premise at odds with *Montana v. United States*, 450 U.S. 544 (1981) which requires a showing of necessity, not mere rationality, in order to subject non-Indians to tribal civil authority:

> * * * But [the] exercise of tribal power beyond what is *necessary* to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. 450 U.S. at 564, emphasis added.

The undisputed fact, that the repossessions here at issue were effected peacefully, coupled with the fact that Babbitt Ford could not lawfully repossess a vehicle under the terms of the purchase contract and applicable Arizona law if it engaged in or created the occasion for reservation violence, render the tribal laws at issue here unnecessary to protect the peace, health and welfare of the tribe. Indeed, the severe and cumulative penalties imposed under federal and state law upon a secured party, like Babbitt Ford, for effecting a self-help repossession violently or in breach of the peace provide adequate deterrences against violence or the occasion of violence. As summarized by one leading commentator, at least four (4) categories of cumulative sanctions and penalties could be imposed under federal and state law for a self-help repossession effected in breach of the peace. These are: (1) criminal liability under the Federal Consumer Credit Protection Act since "if the debt collector threatens violence, he may still be guilty of an extortionate collection practice" under 18 U.S.C. §§891-896; (2) tort liability for compensatory and punitive damages for assault, battery, conversion, or intentional infliction of emotional distress; (3) statutory liability under A.R.S. §44-3153 [U.C.C. §9-507] "for improper repossession" in addition to common law, tort damages in a minimum amount of "not less than the

credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price," A.R.S. §44-3153(A); and (4) the complete loss of the secured party's right to a deficiency judgment against the debtor, a sanction which one commentator has called "potentially [the] most significant consequence of a creditor's misbehavior." White and Summers, *Uniform Commercial Code*, 2d. Ed., §26-12, §26-13, §26-14, §26-15 pp. 1123-1135 (1980) [quoting *passim*]; *Cf. Day v. Schenectady Discount Corporation*, 125 Ariz. 564, 611 P.2d. 568 (App., 1980).

In view of these contractually and legally mandated deterrences against violence or its near occasion in effecting self-help repossessions, the tribal laws at issue here, which apply without regard to any showing of a potential for breach of the peace, merely impose unilateral burdens and modifications on the lawful exercise of off-reservation, contractual rights even as they are in no way "necessary" or "essential" to protect tribal self-government. The decision in *Brown v. Babbitt Ford, Inc., supra*, makes it clear that the right to self-help repossession under the circumstances of this case is a valuable, contractual right. Holding that *"the most important remedy available to the secured creditor is the right to take possession of the collateral following the debtor's default,"* the Arizona appellate courts have repeatedly held that *"[i]t is well settled that a secured creditor, upon default of the debtor, has the immediate right to possession of the collateral" because "upon a debtor's default, title and right of possession pass to the creditor,* and the creditor may repossess the property by self-help" as a matter of contractual right. *City Corp Homeowners, Inc. v. Western Surety Company*, 131 Ariz. 334, 336, 641 P.2d 248, 250 (App., 1982) citing *American National Bank & Trust Company v. Robertson*, 384 So.2d. 1122, 1123 (Ala.Civ.App., 1980); *Brown v. Babbitt Ford, Inc., supra*, 117 Ariz. at 199.

By effectively eliminating or, at least, substantially curtailing, Babbitt Ford's right to immediate repossession of the secured property upon the Indian debtor's contractual default,

7 N.T.C. §607 and §609 unilaterally impair the most important contractual right available to Babbitt Ford and thus infringes the personal liberties guaranteed to Babbitt by the Bill of Rights. The ambit of personal liberties protected by the Bill of Rights includes the liberty to make a lawful, binding and enforceable contract. Although the liberty to make legal contracts is not absolute, it is at least clear, as one Court put it, that interference by one state with the "right to contract within another state concerning property within the state, is a denial of due process," especially where, as here, the evils sought to be remedied "would be prevented adequately under the existing . . . legislative provisions" of the state in which the contract is made. In circumstances analogous to those here present, this Court has held that one state cannot directly or indirectly interpose its powers between a corporation transacting business in another state and the corporation's creditors so as to "forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance" even though the corporation owned property and did business in the state making the attempted, extraconstitutional regulation. *New York, L.E. & W. R. Co., v. Commonwealth of Pennsylvania*, 153 U.S. 628, 646-647 (1894); *Fidelity & Deposit Company of Maryland v. Tafoya*, 270 U.S. 426, 434-435 (1926); *Department of Financial Institutions v. General Finance Corporation*, 86 N.E.2d. 444, 449 (Ind., 1949) quoting *Algeyer v. Louisiana*, 165 U.S. 578, 591-592 (1897). The rule of these cases is summarized in 16A *C.J.S.* "Constitutional Law" §575 as follows:

> The right to make legal contracts of all kinds, without fraud or deception, is not only a part of the civil liberties possessed by every individual who is sui juris, but is both a liberty and a property right within the protection of the guarantees against the taking of liberty or property without due process of law. p. 607, (citations and footnotes omitted.)

> The due process clause of the Fourteenth Amendment denies to any state the power to restrict or control the obligation of contracts executed and to be performed outside the state, notwithstanding one of the contracting parties and subject matter of the contract may be within the state. pp. 609-610, (citations and footnotes omitted.)

The Court has recently recognized that contractual rights and remedies may be impermissibly infringed by laws which repudiate express promises so as to affect detrimentally "the value of a security provision" without replacing it "by an arguably comparable security provision." The Navajo tribal laws at issue here destroy the security provisions of the contract without replacing them with security provisions of equal value and merely increase the cost of contract enforcement while giving the debtor additional time to remove or otherwise sequester the property from its lawful possessor. *United States Trust Company v. New Jersey*, 431 U.S. 1, 19, 26-27, note 26 (1977). Both the holding and the language of *W.B. Worthen Company v. Kavanaugh*, 295 U.S. 56 (1934) are thus applicable here:

> • • • Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason in a spirit of oppression. • • • With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor. 295 U.S. at 60.
>
> Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he has every incentive to refuse to pay a dollar. • • • 295 U.S. at 60-61.
>
> • • • The changes of remedy . . . are seen to be an oppressive and unnecessary destruction of nearly all the inci-

dents that give attractiveness and value to collateral security. 295 U.S. at 61-62.

Thus, both the extraconstitutional structure of the Navajo Tribal Courts outlined in the Petition (pp. 22-26) but not denied by Respondents, and the substantive features of the subject tribal laws as applied to the contracts here at issue, create unwarranted intrusions into the personal liberties and property rights of Babbitt Ford. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) teaches that such intrusions into Babbitt Ford's rights and liberties cannot be accomplished by an Indian tribe through the exercise of its retained sovereignty; and contrary to Respondents' contentions to the contrary, the Court expressly extended the *Oliphant* rule in the *Montana* case to civil matters like this case. 450 U.S. at 565.

Respondents' position, like the decision of the Court below, simply ignores the long line of cases in which the Court had held that "Indians going beyond reservation boundaries have generally been held subject to the same nondiscriminatory state laws otherwise applicable to all citizens" which apply on the reservation where, as here, the object of their application is "no mere local matter." These cases further hold that individual Indians must abide by the duties and bear the burdens of their commercial dealings and property ownership and cannot enjoy only the privileges thereof by virtue of their status as Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149, 154-155 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Shaw v. Gibson-Zahniser Oil Corporation*, 276 U.S. 575, 580-581 (1928); *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 607-610 (1943); *Choteau v. Burnett*, 283 U.S. 691 (1931); *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936); *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949); *Ward v. Race Horse*, 163 U.S. 504, 514-515 (1896); *Rice v. Rehner*, U.S. , 103 S.Ct. 3291 (1983).

Contrary to Respondents' suggestion, there is nothing wrong, constitutionally or otherwise, with the contractual right of self-help repossession, and the fact that two states and some commentators dislike this remedy does not detract from its legality in Arizona and forty-seven (47) other states and does not constitute sufficient reason to free individual Indians from their voluntarily assumed obligations in off-reservation, contractual dealings. Respondents' attempt to attack collaterally the provisions of A.R.S. §44-3149 [U.C.C. §9-503] and to repeal both it and sales contract which expressly incorporate it throughout a sizeable portion of the States of Arizona and New Mexico fails to heed the admonition of the *Oliphant* decision, that Indian tribes are not states of the union and, being within the geographical limits of the United States, exist in subordination to the federal and state governments.[1] *Oliphant v. Suquamish Indian Tribe, supra,* 435 U.S. at 211.

Nor does this case resemble *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) or the various licensing, taxation and zoning cases cited by Respondents' Brief in Opposition (pp. 7-8). Unlike the non-Indian parties in those cases, Babbitt Ford does not voluntarily carry on any business on the reservation, does not benefit from tribal police protection or other governmental services, and does nothing which would justifiably require it to submit to tribal government. Significantly, while a

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[1] "Clearly there is nothing unconscionable in a contract clause authorizing the repossession of chattel on default" since Article 9-503 of the U.C.C. "specifically authorize[s] such self-help remedies upon the condition that they be carried out without breach of the peace." *Nevada National Bank v. Huff,* 582 P.2d. 364, 369 (Nev., 1978). Moreover, the self-help repossession provisions of U.S.C. §9-503, A.R.S. §§44-3149, have been regularly upheld against challenges to their constitutionality. As one Court put it, "[t]he United States Supreme Court has declined to grant certiorari to review four different appeals in which the constitutionality of self-help repossessions has been upheld," and "at least thirty [30] appellate courts that had the opportunity to consider the issue have upheld the constitutionality of self-help repossessions." *Helfinstine v. Martin,* 561 P.2d. 951, 955 (Okl., 1977) and cases cited.

non-Indian in the taxing and licensing cases may avoid paying the tax or obtaining the license by voluntarily choosing not to deal with the tribe or on the reservation, Babbitt Ford is compelled either to submit to tribal law and tribal court jurisdiction through its mere entry onto the reservation or to abandon both its possessory rights in the vehicle and its contractual right to peacefully retake possession of the chattel upon the Indian purchasers' default. Unlike the non-Indian parties in the licensing and taxation cases, Babbitt Ford's presence on the reservation and its subjection to tribal law is compelled by the Indian purchasers' default.

Respondents simply ignore the fact that the only consensual features of the transaction here at issue take place off of the reservation, and expressly authorize self-help repossession. Where, as here, the Indian purchaser is clearly in default, the secured creditor, Babbitt Ford, is entitled to immediate possession of the collateral, and the refusal to surrender the collateral is both a conversion of the chattel and a breach of the contract. *Production Credit Association v. Nowatzki*, 280 N.W.2d. 118, 121-123 (Wis., 1979). As such, the tribal laws at issue here, 7 N.T.C. §607 and §609, accomplish the remarkable feat of rewarding a tortfeasor who is in breach of contract while punishing a secured creditor who peacefully exercises his contractual right to immediate repossession of the secured vehicle.

Contrary to Respondents contentions, the cases in which this Court has previously scrutinized the 1868 Navajo Treaty, 15 Stat. 667-668, have all involved circumstances strictly confined within the boundaries of the Navajo reservation. None of those cases cited in Respondents' Brief in Opposition (pp. 10-11) deals with a situation involving off-reservation commercial transactions which entail on-reservation contractual enforcement. The Court's careful proviso in *McClannahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) applies to all such cases and distinguishes them all from this case: "We are not dealing with Indians who have left the reservation" but with the "narrow question" of activities "exclusively on the reservation." 411 U.S. at 167-168.

Conversely, in *Utah & Northern Railway Company v. Fisher*, 116 U.S. 28 (1885) and *Ward v. Race Horse*, 163 U.S.

504 (1896) the Court construed provisions of the 1868 Bannock Treaty which are identical to the articles of the 1868 Navajo Treaty at issue here to hold that Indians residing on the reservation were subject to state laws for their off-reservation activities. "To suppose that the words of the treaty intended to give the Indian the right to enter into already established states . . . and there exercise the right to hunting, in violation of the municipal law, would be to presume that the treaty was drawn so as to frustrate the very object it had in view," the Court held in *Ward*, 163 U.S. at 508-509, while in *Fisher* the Court held that under such treaty provisions the "process of its [the state's] courts may run into an Indian reservation of this kind, where the subject matter or controversy is otherwise within their cognizance." 116 U.S. at 31. Together with the material set forth in the Petition (pp. 26-29), these cases support Babbitt Ford's contention that these treaties contemplate the application of state law in cases such as the instant one.

In this case Babbitt Ford did nothing more than repossess peacefully motor vehicles which it was contractually and legally entitled to possess. Babbitt Ford never employed force, stealth or deceit and never engaged in any sharp collection practices even as the tribal laws here at issue seek to render Babbitt Ford's contractual right of possession a sharp and deceitful collection practice *per se*.

We submit that 7 N.T.C. §607 and §609 as applied to Babbitt Ford here do not fall within the scope of the Navajo Indian Tribe's retained sovereignty. We are quite confident that we have not over estimated the ramifications of the Ninth Circuit's decision here. Such ramifications, together with the Ninth Circuit's radical departure from the Court's precedent and the conflicting approaches to the resolution of this issue by federal and state courts, warrant review of the judgment and opinion of the Court below. We thus submit that certiorari should be granted.

Respectfully Submitted

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No. 83-610

In the Supreme Court of the United States

OCTOBER TERM, 1983

BABBITT FORD, INC., PETITIONER

v.

NAVAJO INDIAN TRIBE, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Navajo Tribe may (i) bar repossession of personal property of members of the Tribe located on Reservation land without the written consent of the purchaser or an order of the Navajo Tribal Court, and (ii) provide that any person who violates this prohibition is liable in damages.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treaty, statutes and rules: Page

Miscellaneous:

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This brief is filed in response to the Court's invitation.

STATEMENT

1. Petitioner Babbitt Ford is an Arizona corporation that owns and operates car dealerships in Page and Flagstaff, Arizona. Each dealership is located in close proximity to the Navajo Indian Reservation, and each derives a substantial portion of its income from sales to members of the Navajo Tribe. Pet. App. 3.

Petitioner states (Pet. 3) that it sells approximately 70 vehicles per month—approximately 50% of its total sales—to persons it believes to be residents of the Navajo Reservation. The sales contracts with Indians are entered into at the dealership, and delivery of the automobiles occurs off the Reservation. The majority of these transactions involve loan contracts that apparently provide for repossession by petitioner upon default by the purchaser. Pet. App. 3. Arizona law provides that "[u]nless otherwise agreed," a secured party "has on default the right to take possession of the collateral," and that "[i]n taking possession a secured party may proceed without judicial process if this can be done without breach of the peace" (Ariz. Rev. Stat. Ann. § 44-3149 (1967)).

However, repossession of vehicles and other personnel property from members of the Navajo Tribe on the Navajo Reservation is regulated by the Navajo Tribal Code (N.T.C.). A section of that Code in effect since 1968 provides that "[t]he personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession" except with the written consent of the purchaser secured at the time repossession is sought, or, if the Indian refuses to give consent, "by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding." 7 N.T.C. § 607; Pet. App. 3. On January 29, 1982, the Judges of the Navajo Tribal Courts, with the approval of the Chief Justice of the Tribe, adopted a rule to implement the latter provision.[1] The preamble to the rule states that "[t]he application of [Section 607] to non-Indian creditors has been the occasion of a great deal of liti-

[1] We have lodged a copy of the Tribal Court rule with the Clerk of this Court.

gation, most of which has been unnecessary"; that the extension of secured credit to Navajo Nation residents is "beneficial to the residents of the Navajo Nation"; and that "the protection of the rights of extenders of credit as to property used as security and the protection of the rights of consumers within the Navajo Nation" required the courts to adopt a rule for repossession which is "simple, speedy and fair."

The rule provides for the remedy of repossession to be sought by means of a "verified petition," which "may be in standardized form" or "may be informal or drafted by a creditor without counsel" (Tribal Ct. R. § 5(a) (1982)). The petition must recite the name and address of the person from whom repossession is sought; identify the property in a manner that will facilitate its seizure; describe the agreement and breach of the agreement that give rise to a right of repossession; state the balance due; and identify the "exact relief or remedy which is being sought (*e.g.*, repossession by the creditor, repossession by the police, delivery into court, damages, etc.)." § 5(b). The clerk of the court then must issue an order to the person possessing the property directing him to appear and show good legal grounds why the property should not be repossessed. A hearing is to be held no less than 5 nor more than 10 days after the order issues, subject to limited continuances. §§ 6, 7.[2]

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[2] The Tribal Court also may order immediate repossession pending the hearing if it appears on the basis of an affidavit submitted by the petitioner that there is an immediate and likely danger that the property will be damaged, destroyed, hidden, or removed from the jurisdiction of the Tribal Court or impaired as security. In that event, the court may order the property to be held by the petiitoner either with or without posting a bond, or held under the control of the Navajo Nation or the court. § 10.

The hearing is to be informal, and the only question to be considered is whether the property is security under the agreement and whether there has been a breach so as to justify repossession. Where the right to repossess is addressed by the contract between the creditor and the tribal member, "the court shall apply the terms of that contract unless they are unconscionable or contrary to law." § 4. The court's decision must be rendered within 24 hours of the hearing, and if the petition for repossession is granted, the court's order may be executed by the petitioner or a Navajo Police Officer. § 8.

Section 608 of the Navajo Tribal Code provides that any person who willfully violates Section 607—*i.e.*, who resorts to self-help repossession without either the written consent of the tribal member or order of the Tribal Court—may be excluded from land subject to the jurisdiction of the Tribe. In addition, any business whose employees are found to be in willful violation may be denied the privilege of doing business on land subject to the jurisdiction of the Tribe. 7 N.T.C. § 608. Any person or business who violates the provision also "is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused" (7 N.T.C. § 609; Pet. App. 4 n.1). If the personal property repossessed consists of consumer goods, the purchaser has a right to recover an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price. 7 N.T.C. § 609. The latter measure of the minimum amount of damages available is identical to that in Section 9-507(1) of the Uniform Commercial Code (U.C.C.) (1971) for situations in which a secured creditor does not follow applicable procedures for protecting his interest in the

collateral. That measure of damages in the U.C.C. in turn has been adopted by Arizona (Ariz. Rev. Stat. Ann. § 44-3153 (1967)) and by New Mexico, the other State in which the Navajo Reservation principally lies (N. M. Stat. Ann. § 55-9-507 (1978)).

2.a. Despite the explicit prohibition in the Navajo Tribal Code, petitioner apparently for some time has repossessed approximately 10 vehicles per month belonging to members of the Navajo Tribe and located on the Reservation, without obtaining either the written consent of the owner of the property or an order from the Navajo Tribal Court authorizing the repossession. Pet. 3; Pet. App. 3, 26 n.2.[3] In 1980, petitioner's agents entered the Reservation and repossessed vehicles belonging to Tom and Lorraine Sellers and Barney and Alice Joe, members of the Navajo Tribe, without complying with the requirements in Section 607 of the Tribal Code. The Sellers and Joes brought an action for damages in Navajo Tribal Court pursuant to Section 609 of the Tribal Code, and the court awarded damages in the amount of $476.75 to the Sellers and $4,455.75 to the Joes. The Navajo Court of Appeals affirmed the damage awards. Pet. App. 4 & n.2.

b. Petitioner then brought this action in the United States District Court for the District of Arizona challenging the sections of the Tribal Code that govern repossession from Indians on the Reservation and provide civil remedies for violations. The district court held that the Tribe had inherent sovereign power to apply its prohibition against self-help repossession to

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[3] Petitioner acknowledges these two alternative ways to accomplish repossession under the Tribal Code, but does not suggest that it attempted to comply with either in making the repossessions. See Pet. 3.

petitioner and that this power was not divested by the Treaties between the United States and the Navajo Nation (Pet. App. 36-47). However, the court held that the liquidated damages provision in 7 N.T.C. § 609 is invalid insofar as it applies to repossessions that were justified and would have been authorized by the Tribal Court if the creditor had resorted to that process, because, in the court's view, the damage remedy "overestimates" the value of the procedural protection in such circumstances (Pet. App. 48-50).

c. The court of appeals affirmed the district court's holding that the Tribe retained its sovereign power to apply its repossession statute to a non-Indian who entered onto the Reservation, but it reversed the district court's holding invalidating the provision in 7 N.T.C. § 609 for recovery of a minimum amount of civil damages (Pet. App. 1-24).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court, another court of appeals, or a state court. Nor does this case raise any issue of general importance warranting further review.

1. As an initial matter, it is important to put the issues presented in their proper perspective, because petitioner has greatly exaggerated the nature of the Tribe's action here.

a. The Navajo Tribe has not impaired or "unilaterally altered" the obligations of its members under contracts entered into with petitioner or erected a barrier behind which tribal members may hide from their contractual responsibilities, as petitioner repeatedly suggests (Pet. 9, 14-16, 19-20, 21, 22). To the contrary, the Tribal Court rule implementing Sec-

tion 607 of the Tribal Code makes clear that the substantive terms of the member's contract are to be given effect and that where the contract addresses the remedy of repossession, the court shall not deny that remedy except in circumstances that are unconscionable or contrary to law. Tribal Ct. R. §§ 4, 8.[4] Thus, the Navajo Tribal Code explicitly *preserves* the right of a creditor to retake possession of collateral upon default, and simply establishes a procedure for exercising that right on the Reservation. Moreover, the provisions of the Tribal Court rule that we have described above (see pages 2-4, *supra*) on their face provide a fully adequate and expeditious means by which petitioner can effect the repossession of the vehicle of a defaulting tribal member on the Navajo Reservation if the member does not give his written consent. Petitioner has not shown that these provisions are inadequate in practice, and indeed there is no indication that petitioner has ever sought to invoke them.

The established procedures have, however, been widely utilized by other creditors. We have been informed by the Department of Justice of the Navajo Nation that 353 petitions for repossession were disposed of by the Tribal Courts between October 1981 and September 1982 and that an addiitonal 375 petitions were disposed of during the year ending September 30, 1983. We have been further informed by

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[4] In light of the detailed provisions of the Tribal Court rule and the explicit requirement that contract terms be enforced, petitioner's contention (Pet. 23) that the procedures for repossession under 7 N.T.C. § 607 (Pet. App. 4 n.1) are vague and standardless is wholly without merit. This Court cannot fairly assume that these procedures are applied in an arbitrary and capricious manner, and petitioner offers nothing to support its speculative assertions about the potential for such application (see Pet. 23).

the Navajo Department of Justice that resort to tribal procedures in this fashion often prompts an arrangement by which the tribal member can become current in his payments, thereby serving the interests of debtor and creditor alike. It may also be that repossessions have been accomplished without resort to judicial process by obtaining the written consent of the purchaser, as also is permitted by the Tribal Code. There is no reason to believe that petitioner will suffer any substantial hardship if it, too, follows the procedures that have been prescribed by the Tribe for the recapture of property sold to tribal members who have failed to make payment.

Petitioner does not and could not maintain that if it sold a vehicle to a person who resided in or moved to another State in which the legislature had enacted a similar statute barring nonconsensual self-help repossessions, such as Wisconsin (Wis. Stat. Ann. §§ 425.206, 425.305 (West 1974 & Cum. Supp. 1983); see Br. in Opp. 5), either the terms of petitioner's individual contracts or Arizona law would give it a right to violate that State's law and retake possession of the vehicle through the exercise of self-help. There is no reason for a different result as regards a vehicle within the Navajo Reservation and belonging to a member of the Navajo Tribe.

Moreover, in this case, the relevant provision of the Tribal Code has been in effect since 1968 (Pet. App. 3), presumably long before petitioner entered into any of its currently outstanding contracts with tribal members. Those contracts necessarily were entered into against the background of the Tribal Code—which therefore must be regarded as part of the contracts insofar as they contemplate repossession on the Reservation (*Home Building & Loan Ass'n* v. *Blais-*

dell, 290 U.S. 398, 429-430 (1934))—and there accordingly is nothing unfair about application of that preexisting prohibition to the contracts. See *e.g.*, *Texaco, Inc.* v. *Short*, 454 U.S. 516, 531 (1982). Certainly the fact that petitioner may have regularly repossessed vehicles in disregard of the Tribal Code for a number of years prior to 1981 did not give it a prescriptive right to continue to do so.

In any event, the result would not be otherwise even if the Tribe had enacted the special repossession procedures after the contacts in question had been entered into. "Contractual arrangements remain subject to subsequent legislation by the presiding sovereign." *Merrion* v. *Jicarilla Apache Tribe*, 445 U.S. 130, 147 (1982). See also *Home Building & Loan Ass'n* v. *Blaisdell*, *supra*. In this case, the "presiding sovereign" as regards matters on the Navajo Reservation is the Navajo Tribe, and the Tribe's statute that reasonably regulates the procedures for pursuing the remedy of repossession minimally burdens contractual rights and clearly may be applied to existing contracts. *Texaco, Inc.* v *Short*, 454 U.S. at 531; *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 20-21 n.17 (1977); *City of El Paso* v. *Simmons*, 379 U.S. 497, 503-509 (1965). In *Merrion* v. *Jicarilla Apache Tribe*, the Court declined to find that the Tribe had divested itself of its sovereign power to tax by entering into lease contracts with non-Indians that permitted them to enter onto tribal lands and extract oil and gas. 455 U.S. at 146-148. *A fortiori*, as the court of appeals held (Pet. App. 10-11), the contracts entered into by individual Indians did not divest the Navajo Tribe of its sovereign power to maintain the peace, protect the health and welfare of its members, and exclude non-Indians from its Reservation. Peti-

tioner's rights to enter the Reservation at all times remained subject to restriction by the Tribe, and petitioner "cannot remove them from the power of the [Tribe] by making a contract about them." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, No. 81-1370 (Jan. 24, 1983), slip op. 10 (quoting *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 357 (1908)).

b. Petitioner also considerably overstates the supposed conflict between the provisions of the Tribal Code and those of Arizona law and the U.C.C. upon which it relies. Under Arizona law, as under the U.C.C. (§ 9-503) and the law of most states, repossession without resort to judicial process is permissible only "if this can be done without breach of the peace" (Ariz. Rev. Stat. Ann. § 44-3149 (1967)). Thus, as petitioner concedes (Pet. 21), neither Arizona law nor petitioner's individual contracts grant it an *absolute* right to repossess a vehicle by self-help, and a violation of the breach-of-the-peace limitation would render the repossession invalid and would subject petitioner to liability for damages in the same amount that is available under the Tribal Code (Ariz. Rev. Stat. Ann. § 44-3153 (1967)).

Nor has the breach-of-the-peace limitation been construed narrowly to include only instances of actual violence, as petitioner appears to contend (see Pet. 20-21, 22). It ordinarily is sufficient if the creditor's conduct carries with it the *potential* for a disturbance, and in many jurisdictions the creditor may not repossess the property if the purchaser or a third party objects. See generally Mikolajczyk, *Breach of Peace and Section 9-503 of the Uniform Commercial Code—A Modern Definition for an Ancient Restriction*, 82 Dick. L. Rev. 351, 355-370

(1977); Note, *Commercial Law* 22 Ariz. L. Rev. 109, 110-111 (1980). See, *e.g.*, *Rogers* v. *Allis-Chalmers Credit Corp.*, 679 F.2d 138, 141 (8th Cir. 1982); *Wade* v. *Ford Motor Credit Co.*, 8 Kan. App. 2d 737, 668 P.2d 183, 187-188 (1983); *Deavers* v. *Standridge*, 144 Ga. App. 673, 242 S.E.2d 331, 333 (1978). Indeed, in Arizona, whether a breach of the peace has occurred has been held to turn upon whether the creditor entered upon the premises of the debtor and whether the debtor or a third party acting on his behalf consented to the entry and repossession. *Walker* v. *Walthall*, 121 Ariz. 121, 122, 588 P.2d 863, 864 (Ct. App. 1978).

The Navajo Tribal Code implements these principles. Like Arizona law and the U.C.C., it does not require resort to judicial process in all circumstances. Repossession is permissible with the written consent of the purchaser, in which event the written consent constitutes an objective indication that there is no dispute between the parties and resulting potential for a disturbance. In this sense, the Tribe's consent requirement is consistent with and indeed furthers the principle that repossession is barred under the breach-of-the-peace limitation if the purchaser or a third party objects to the repossession. Here, the Tribe by statute has interposed an objection to repossession if the individual Indian does not affirmatively give his consent, although the Tribe's objection may be overcome in proceedings in Tribal Court.

Moreover, the Navajo Tribe, with its special knowledge of affairs on the Reservation and the potential for disturbances there, has expressly determined that any business whose employees repossess property without obtaining the consent of the tribal member or an order of the Tribal Court is "deemed to have

breached the peace of lands under the jurisdiction of the Navajo Tribe" (7 N.T.C. § 609; Pet. App. 4 n.1). A federal court should not lightly second-guess this considered judgment by the Tribe of the measures necessary to avoid a breach of the peace. In addition, as explained above, whether repossession involves an unconsented entry onto the premises of the debtor is an important factor bearing on the validity of self-help repossession even under Arizona law. Given a Tribe's long-recognized power to exclude non-Indians from the lands it occupies and its sovereignty over its territory and members, the "premises" for purposes of this principle under the U.C.C. may properly be viewed as the Reservation as a whole, not merely the particular parcel on which the individual Indian debtor resides. The Tribal Code therefore is consistent with the broader principles governing repossession generally as applied to the special setting of an Indian Reservation.

c. Petitioner's contentions (Pet. 9, 15-16) that the decision below will undermine Indian self-determination and responsibility and adversely affect the extension of credit to Navajos and other Indians also warrant a brief response. This submission again ignores the fact that the Tribe has not barred repossession; the Tribe simply has required that repossession be accomplished in an orderly fashion. Whatever one's view of the Tribal Code provisions as a policy matter, the Tribe's freedom to implement them would appear to be the very essence of responsible self-government and self-determination. Moreover, it seems likely that the enforcement by a Tribal Court of a tribal member's contract with a non-Indian, including the ordering of repossession, would further rather than undermine a sense of individual and

tribal responsibility. In contrast, if repossession could be freely accomplished by the non-Indian creditor by means of self-help, the individual Indian and the Tribe might come to view the legal obligations of Indians to non-Indians as a matter for outsiders to resolve.

We also cannot assume that the availability or cost of credit to Navajo Indians will be substantially affected as a result of the decision below. The preamble to the rule adopted by the Tribal Court, quoted above (see pages 2-3, *supra*), expresses sensitivity to the interests of creditors and the need to assure the continued availability of credit, and it manifests a purpose to administer the repossession provisions in an inexpensive, expeditious and fair manner that will not deter creditors from doing business with Navajo Indians. And we note that numerous petitions for repossession have been filed in Tribal Court by other creditors, thereby indicating that creditors generally have not ceased doing business with Reservation Indians because of the Tribal Code provisions petitioner challenges.

In any event, even if petitioner were correct that the Tribal Code provisions might render credit somewhat more difficult or expensive for Reservation Indians to obtain, the weighing of that interest against the interests sought to be furthered by the Tribe's repossession procedures is precisely the sort of policy decision that is reserved to the Tribe as an aspect of its self-government, just as it was reserved to the Wisconsin Legislature to weigh these competing policy considerations when it enacted a similar prohibition against nonconsensual self-help repossession. Moreover, if the availability of credit in fact does become a significant problem for Navajo Indians in

the future, the political process on the Reservation might well prompt the Tribal Government to reassess the wisdom of its policy.[5] The decision below maintains that flexibility for the Tribe, and it therefore significantly furthers the federal policy of encouraging tribal self-government and self-determination.

2. Especially against the background of the foregoing discussion, it is our view that the court of appeals was clearly correct in upholding the repossession provisions of the Navajo Tribal Code.

a. The 1868 Treaty between the Navajo Nation and the United States provided that a reservation would be set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article." Treaty Between the United States of America and the Navajo Indian Tribe, June 1, 1868, Art. II, 15 Stat. 668; Pet. App. 77. With regard to this Treaty language, the Court observed in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), that "it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the *exclusion of non-Navajos from the prescribed area* was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision" (*id.* at 174-175 (emphasis added)). In

[5] We note as well that 15 U.S.C. 1691 prohibits discrimination on the basis of race, color, or national origin with respect to credit transactions.

view of the broad treaty language and this Court's interpretation of that language, it seems clear that, notwithstanding contracts petitioner entered into with individual Indians off the Reservation, the Navajo Tribe could have excluded petitioner from entering the Reservation altogether, thereby foreclosing the possibility of repossession of vehicles that remained on the Reservation. But the Tribe has not gone that far.

The power to exclude non-Indians from a Reservation "necessarily includes the lesser power to place conditions on entry * * * or on reservation conduct" (*Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 144).[6] In this case, the Tribe has exercised this lesser power by permitting non-Indians to enter the Reservation in order to repossess property of defaulting tribal members upon the condition that the creditor obtain the written consent of the tribal member or an order of the Tribal Court.

b. The validity of the Tribal Code's procedural requirements as applied to petitioner's conduct on the Reservation is reinforced by this Court's decisions concerning the power of Indian Tribes to exercise civil jurisdiction over non-Indians. The Court stated in *Montana* v. *United States*, 450 U.S. 544, 565 (1981), that a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Petitioner's "commercial dealing" and "contracts" with members of the Navajo

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[6] See also 455 U.S. at 173 (Stevens, J., dissenting): "This 'power to exclude' logically has been held to include the lesser power to attach conditions on a right of entry granted by the tribe to a nonmember to engage in particular activities within the reservation." See also *id.* at 182.

Tribe clearly were "consensual" on petitioner's part. To be sure, the contracts in question were entered into off the Reservation, but this does not alter the *Montana* analysis. The Tribe has not sought to extend its substantive law of contract to transactions occurring outside the Reservation boundaries. The only conduct it seeks to regulate—the repossession of property belonging to Indians—occurs on the Reservation itself, and a non-Indian's entry onto the Reservation for that specific purpose itself also is consensual in nature. And of course in the present case, petitioner's contracts with tribal members necessarily were executed against the background of the Tribal Code provisions that made clear to petitioner the procedures that were to be followed if petitioner sought to repossess the vehicles on the Reservation. Because petitioner at the very least assumed the risk that it would have to comply with those procedures, the overall contractual arrangement between the parties that incorporated the potential application of tribal law accordingly was consensual in this respect as well.

In addition, the Court observed in *Montana* v. *United States* that a tribe may retain inherent power to exercise civil jurisdiction over non-members even on fee lands within its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The provisions of the Navajo Tribal Code at issue here were enacted to protect the "economic security" and "health or welfare" of tribal members by requiring prior notice of a repossession, which in turn assures that a tribal member will not be stranded in a remote area of the Reservation without warning; by providing for judicial proceedings to resolve any

disputes and thereby to protect against a wrongful deprivation of property; and by preventing against a breach of the peace that could result from self-help repossessions without the debtor's consent. Pet. App. 9.

It is true that the effect of the Navajo statute is to require petitioner to pursue repossession through the Tribal Court if the Indian debtor does not consent. But "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted). The court stressed this very point with respect to Navajo courts in *Williams* v. *Lee*, 358 U.S. 217 (1959) where it observed that those courts "exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants" (358 U.S. at 222) and held that the exercise of state jurisdiction over the contract dispute there at issue "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves" (*id.* at 223). Accordingly, the provision for petitioner to seek repossession through the Tribe's own courts also is consistent with the Court's conclusion in *Montana* v. *United States* that the exercise of civil jurisdiction over non-Indians is appropriate to protect the "political integrity" of the Tribe, and indeed the Court in *Montana* cited *Williams* v. *Lee* in support of that conclusion. 450 U.S. at 566.

Nor can petitioner draw any support from the fact that Arizona law permits self-help repossession. This Court has interpreted the Navajo Treaty to provide for the exclusive sovereignty of the Navajo Tribe over the Reservation and "to preclude exten-

sion of state law * * * to Indians on the Navajo Reservation." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 175. In this case, of course, the individual tribal members entered into contracts with petitioner off the Reservation, and we may assume for present purposes that for this reason, the substantive contract law of Arizona governs the interpretation of the contract and that petitioner could bring an action in Arizona state court in the event of a breach. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (1973); compare *Williams* v. *Lee*, *supra*. But that is not the issue here.[7] As we have said, the Navajo Tribe has sought only to regulate the procedure by which a party may enforce its contract rights on the Reservation itself. The fact that an individual tribal member temporarily left the Reservation when he entered into the contract does not disentitle the Tribe to apply its procedural requirements in the converse situation, in which the non-Indian comes onto the Reservation. The Navajo Treaty of 1868 provides that an individual Indian forfeits his rights under the Treaty only if he "shall leave the reservation * * * to settle elsewhere" (15 Stat. 671; Pet. App. 83)—*i.e.*, if he leaves the Reservation permanently.[8] Here, however, there is no suggestion that

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[7] There is no indication that petitioner has brought an action in state court to enforce its contracts with Navajo Indians. If it did and the state court were held to have jurisdiction, the Navajo Tribal Courts presumably would respect the state court judgment if petitioner sought to execute that judgment on the Reservation.

[8] The excerpts from the unpublished transcripts of the sessions at which the Treaties were negotiated, relied upon by petitioner (Pet. 28-29), likewise refer to situations in which an Indian has left the Reservation permanently.

the Navajo Indians from whom petitioner repossessed vehicles had left the Reservation permanently and settled elsewhere.

Finally, petitioner's objections to the Tribal Court's award of damages against it for the wrongful repossession of the vehicles are insubstantial and do not warrant review. The application of the particular section of the Tribal Code providing for the award of damages is simply an incident of the broader application to petitioner of the Tribe's prohibition against self-help repossession. As we have explained, application of that prohibition is fully consistent with legal principles governing jurisdiction over Indian matters. The measure of damages under the Tribal Code in the event of a wrongful repossession is the same as that available under state law (Ariz. Rev. Stat. Ann. § 44-3153), and therefore cannot be regarded as an aberrational provision to which it would be unfair to subject a non-Indian. In addition, the availability of such a remedy is necessary to provide compensation for victims of wrongful repossessions[9] and at the same time to enforce the substantive prohibition, which otherwise might be violated with impunity. In any event, the narrow issue of the authority of the Tribal Court to award damages in these circumstances would not appear to be one of continuing importance. The court of appeals has held that the Tribe's procedures gov-

[9] We note that petitioner itself persuaded the Arizona Court of Appeals, on conflict of laws grounds, not to permit a member of the Navajo Tribe to bring an action in *state* court to recover damages under 7 N.T.C. § 609 for a wrongful repossession in violation of 7 N.T.C. § 607, Pet. App. 4 n.1. See *Brown* v. *Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (1977). Petitioner's protestations regarding the suitability of the Tribal Court—the only forum remaining—for the award of damages therefore do not come with especially good grace.

erning repossession on the Reservation must be followed by petitioner. We must assume that petitioner henceforth will adhere to its obligation to do so, thereby obviating any occasion for a tribal member to seek damages in the future.[10]

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[10] As respondents explain (Br. in Opp. 8-10), the cases upon which petitioner relies (Pet. 9-12) are not in conflict with the decision below. For example, in *Brown* v. *Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (1977), the Arizona Court of Appeals declined to consider the validity of the Tribe's repossession statute, the authority of a Tribal Court to award damages under it, and the authority of the State to impose its law on the Navajo Reservation. It simply declined to entertain a damages action on conflict of laws grounds. 117 Ariz. at 194 n.2, 198-199, 571 P.2d at 692 n.2, 695-696. In *Little Horn State Bank* v. *Stops*, 170 Mont. 510, 555 P.2d 211 (1976), cert. denied, 431 U.S. 924 (1977), the Montana Supreme Court sustained the writ of execution issued by a state court and levied by the sheriff by means of the garnishment of the wages of an Indian on the reservation to enforce a judgment in an action on a contract entered into off the reservation. In this case, of course, petitioner did not bring an action in state court; it resorted to self-help. Moreover, in the *Little Horn State Bank* case, the court expressly relied upon the absence of any tribal mechanism for enforcement of the state court judgment (555 P.2d at 213-214); here the Navajo Tribe has enacted a mechanism for repossession. In *Duluth Lumber & Plywood Co.* v. *Delta Development, Inc.*, 281 N.W. 2d 377 (Minn. 1979), the court sustained state court jurisdiction over a breach-of-contract suit against an Indian Housing Authority because, the court held, the transaction was not confined to the reservation. *Id.* at 382-383. In this case, in contrast, the question whether a state court would have jurisdiction over a suit by petitioner against an Indian debtor simply is not involved. In addition, Minnesota, unlike Arizona, has accepted jurisdiction under Public Law 280. See 281 N.W. 2d at 382-383.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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